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No. 354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES OF AMERICA,
Appellant,

v.

SOUTH-EASTERN UNDERWRITERS ASSOCIATION, *ET AL.*,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

THE UNITED STATES OF AMERICA, Appellant, *vs.* SOUTH-EASTERN UNDERWRITERS ASSOCIATION, *et al.*, Appellees.	No. 354.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR APPELLEES.

The indictment in the instant case charges conspiracy —to restrain and monopolize *commerce* in fire insurance— in violation of Sections 1 and 2 of the Sherman Act.

The District Court dismissed the indictment.

The Government appeals from this dismissal.

Opinion Below.

The opinion below, setting forth the grounds for this dismissal, is reported in 51 F. Supp. 712 (R. 17-20, incl.).

Jurisdiction.

The Government invokes the jurisdiction of this Court under the Act of March 2, 1907, Chap. 2564, 34 Stat. 1246 as amended by the Act of May 9, 1942, Chap. 295, Sec. 1, 56

Stat. 271, 18 U. S. C. 682, known as the Criminal Appeals Act; and Judicial Code Sec. 238, 28 U. S. C. Sec. 345.

The Government's petition for appeal was filed in the court below on August 30, 1943 and an order of that court allowing such appeal was filed on the same day (R. 21, 22).

The record on appeal was filed herein on September 15, 1943 and an order of this Court noting probable jurisdiction was thereafter entered on October 25, 1943 (R. 24).

Question Presented.

The sole issue here presented is a question of law.

This issue is whether fire insurance *in and of itself* is interstate *commerce*[1] within the meaning of the Sherman Anti-Trust Act.

The court below has so construed the indictment.

The indictment.

The indictment dismissed below contains two Counts.

Count One charges that the defendants have engaged "in a conspiracy to fix and maintain arbitrary and non-competitive premium rates *on fire insurance*[2] sold by them in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, which conspiracy has been in restraint of the interstate trade and commerce described in this indictment in violation of section 1 of * * * the Sherman Act" (par. 21; R. 10-11 incl.).[3] This Count then purports to

---

[1] The word "commerce", having a meaning roughly synonymous with "trade" when used in Sections 1 and 2 of the Sherman Act, is herein used to denote both "trade" and "commerce". See *Atlantic Cleaners & Dyers, Inc. et al.* v. *United States*, 286 U. S. 427, 434 (1932); *Apex Hosiery Co.* v. *Leader et al.*, 310 U. S. 469, 494, 495 (1940).

[2] Italics ours throughout unless otherwise indicated.

[3] Paragraph references are to paragraphs in the indictment.

set forth certain of the terms of the alleged conspiracy, including the establishment of rates and acts ancillary thereto (pars. 22-23 incl.) and avers that said terms and the concerted action of the defendants pursuant to the conspiracy have suppressed competition in fire insurance (par. 24; R. 11-12 incl.).

The Count then concludes that the defendants have engaged in an "unlawful conspiracy to restrain, obstruct, and burden *interstate trade and commerce in fire insurance* * * *" (par. 26; R. 12-13 incl.).

Count Two charges that the defendants have engaged "in a conspiracy to monopolize trade and commerce *in fire insurance* in and among the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia in violation of section 2 of * * * the Sherman Act" (par. 28; R. 13). The indictment then purports to set forth certain of the terms of the alleged conspiracy, including the establishment of rates and acts ancillary thereto (pars. 29-30) and claims that said terms and the concerted action of the defendants pursuant to the conspiracy have furthered monopolization of fire insurance (par. 31; R. 13-14 incl.).

The Count finally concludes with the averment that the defendants have engaged in an "unlawful conspiracy to monopolize *interstate trade and commerce in fire insurance*" (par. 33; R. 15).

Construction of indictment.

The District Court construed this indictment, in conformity with its terms, as charging that the business of fire insurance, *in and of itself*, is interstate *commerce* within the meaning of the Sherman Act and as charging that the alleged conspiracies to restrain and to monopolize *that commerce* had violated the Act.

The lower court's construction appears in the following excerpt from its opinion:

> "On November 20, 1942, an indictment was returned by a Grand Jury of this Court against one hundred and ninety-eight corporations and twenty-seven individuals, charging such corporations and individuals with a conspiracy to fix and maintain arbitrary and non-competitive *rates on fire insurance* sold by them in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, in violation of Section 1 of the Sherman Anti-Trust Act, 26 Stat. 209, and with a conspiracy to monopolize *trade and commerce in fire insurance* in said States in violation of Section 2 of the Act.
>
> • • • • • •
>
> "To constitute a violation of the Sherman Act, the restraint and monopoly denounced must be that of interstate trade or commerce, and, unless the restraint and monopoly charged in the indictment be restraint or monopoly of interstate trade or commerce, the indictment must fall.
>
> "It is not a question here of whether the defendants participated in some incidental way in interstate commerce or used in some instances the facilities of interstate commerce, but is rather whether the activities complained of as constituting the business of insurance *would themselves constitute interstate trade or commerce,* and whether defendants' method of conducting same amounted to restraint or monopoly of *same*" (R. 17-18).

This construction controlling.

The District Court's construction of the indictment, namely that it charges a restraint and monopoly solely of *commerce* in fire insurance, and not a restraint and monopoly of fire insurance affecting *other* commerce, in violation of the Sherman Act, is of course here controlling.

This Court has always considered itself bound on such appeals under the Criminal Appeals Act by the lower court's construction of the indictment.

In *United States* v. *Borden Company et al.*, 308 U. S. 188, for example, involving an appeal by the Government from a judgment of a District Court sustaining demurrers to an indictment under the Sherman Act, this Court squarely ruled that:

> "This Court must accept the construction given to the indictment by the District Court as that is a matter we are not authorized to review" (p. 193).

See also:

United States v. *Colgate & Company*, 250 U. S. 300;
United States v. *Yuginovich et al.*, 256 U. S. 450;
United States v. *Winslow*, 227 U. S. 202;
United States v. *Patten*, 226 U. S. 525.

Issues sought to be raised by Government brief.

The issue raised by the indictment, namely whether fire insurance is, in and of itself, interstate *commerce* within the meaning of the Sherman Act, is thus much narrower than the two issues now attempted to be raised in the Government's brief.

The issue here presented is *not* that discussed in Point I of the Government brief (p. 13, *et seq.*), namely whether:

> "Appellees' fire insurance business is subject to the federal commerce power."

The indictment nowhere puts in issue the broad question of whether Congress *could* on any theory regulate fire insurance. It charges merely that one Act of Congress, namely the Sherman Act, applies to fire insurance in the manner

alleged in the indictment. The issue is not what Congress *could* do but what it *has* done.

The issue here presented likewise is *not* that discussed in Point II of the Government brief (p. 69, *et seq.*), namely whether:

> "The insurance business is subject to the Sherman Act."

The indictment as construed below nowhere puts in issue the broad question of whether the Sherman Act *could* on any theory apply to fire insurance. It charges that fire insurance is, in and of itself, interstate commerce within the meaning of the Sherman Act and thus subject to that Act—not whether fire insurance could possibly be reached by the Act on some unspecified theory that it burdens or restrains other activities that are commerce.

Furthermore, two general statements are made in the Government's brief with respect to the issue in this case (p. 70, footnote 88, and pp. 99-123) which require correction. We wish to make plain that:

a) Defendants, in contending that fire insurance is not interstate commerce within the meaning of the Sherman Act, mean just that. We submit that fire insurance is neither (1) commerce nor (2) interstate.

b) Defendants, in contending that fire insurance is not interstate commerce within the meaning of the Sherman Act, are not seeking statutory exemption under the "rule of reason". As we stated in our brief below—"This is an issue more properly presented during a trial than on demurrer."

Argument.

Defendants respectfully submit that fire insurance, in and of itself, is not interstate *commerce* within the meaning of the Sherman Act.

Defendants specifically submit, in support of the dismissal of the indictment below, that:

1. This Court should not repudiate its uniform decisions of the past 75 years that fire insurance is not commerce.

2. Congress has accepted and approved the Supreme Court decisions that fire insurance is not commerce.

3. The States have curtailed competition in fire insurance in reliance upon the Supreme Court decisions that fire insurance is not commerce.

4. This Court will unsettle the law applicable to fire insurance and expose defendants to retroactive criminal penalties if it now holds that fire insurance is commerce.

5. The power of Congress to regulate fire insurance is not here at issue.

I.

This Court Should Not Repudiate Its Uniform Decisions Of The Past 75 Years That Fire Insurance Is Not Commerce.

Government argument.

The Government argues in its brief that fire insurance is "commerce", and thus "commerce" subject to the Sherman Act, but cites no cases of this Court so holding.

The Government instead attacks and demands a repudiation of the uniform holdings of this Court for over 75 years to the effect that neither fire insurance nor the business of fire insurance is commerce.

That complete repudiation of the many insurance cases decided by this Court is sought, is shown by the following:

The Government bluntly appeals to the "prerogative" of this Court to determine whether or not to "adhere to

prior decisions" (pp. 10 and 80)[1], and criticizes defendants' opposition to "a reversal of this Court's past doctrine" (pp. 11 and 123).

The Government admits that formerly it would have been "futile" to have brought suit under the Sherman Act against insurance companies (p. 97), but asserts that "Congress was not as a matter of legislative intention attempting to bind the Court to the tenets of its prior decisions, or to deprive it in this field alone of its frequently exercised privilege of changing its mind" (p. 79).

The Government states that the administrative inaction on its part in instituting suit was the result of "coercion of judicial pronouncements"—the barrier to the application of the Sherman Act having been "erected by the judiciary, not the legislative nor the executive"—and that therefore "only the judiciary can remove it" (p. 99).

In brief, the Government, without the support of a single relevant authority, demands that this Court now hold for the first time that fire insurance is commerce, that all of its previous decisions in this regard are wrong and thus that the indictment be sustained.

Uniform rulings on insurance.

This Court beyond question has squarely and repeatedly held that fire insurance, whether or not a business, is not commerce.

In 1868, the question of whether fire insurance is commerce was first presented to this Court in the now famous case of *Paul* v. *Virginia*, 8 Wall. (75 U. S.) 168. An insurance agent there attacked the validity of State regulation of fire insurance on two independent grounds, either of which, if upheld, would have sufficed to establish the inva-

[1] Page references appearing herein are to the Government brief where not immediately following a quotation from a case, statute, report or article.

lidity of the regulation. The second ground—characterized by the agent as "conclusive"—was that fire insurance is "intercourse" and thus "commerce" under *Gibbons* v. *Ogden*, and hence protected by the commerce clause of the Constitution from State regulation (8 Wall. 171-174).

This Court, in ruling that the State regulation in question was not invalid on either of the grounds advanced, squarely held that:

> "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts *are not articles of commerce* • • • They *are not subjects of trade and barter* • • • They *are not commodities* to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts *are not inter-state transactions, though the parties may be domiciled in different States.* • • • *They are, then, local transactions*, and are *governed by the local law. They do not constitute a part of the commerce between the States* • • • " (p. 183).

In subsequent decisions, the Supreme Court has repeatedly reexamined and uniformly reaffirmed that not only the contract—but the very *business*—of fire insurance is not commerce.

1895—*Hooper* v. *California*, 155 U. S. 648:

> "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce" (p. 655).

1896—*Noble* v. *Mitchell*, 164 U. S. 367:

> "• • • the business of insurance is not commerce • • •" (p. 370).

1900—*New York Life Insurance Company* v. *Cravens*, 178 U. S. 389:

> "That the business of life insurance is not interstate commerce is decided * * *" (p. 401).

1913—*New York Life Insurance Company* v. *Deer Lodge County*, 231 U. S. 495:

> "* * * contracts of insurance are *not commerce at all, neither state nor interstate*" (p. 510).

1927—*Bothwell et al.* v. *Buckbee, Mears Company*, 275 U. S. 274:

> "A contract of insurance, although made with a corporation having its office in a State other than that in which the insured resides and in which the interest insured is located, is not interstate commerce" (pp. 276-7).

1935—*Colgate* v. *Harvey*, 296 U. S. 404:

> "The business of insurance has grown to vast proportions * * *. But insurance is not commerce * * *" (p. 432).

The following are additional decisions in which this Court has ruled, in accord with *Paul* v. *Virginia*, that insurance is not commerce:

Ducat v. *Chicago*, 77 U. S. 410;
Liverpool Insurance Company v. *Massachusetts*, 77 U. S. 566;
Philadelphia Fire Association v. *New York*, 119 U. S. 110;
Nutting v. *Massachusetts*, 183 U. S. 553;
Northwestern Mutual Life Insurance Company v. *Wisconsin*, 247 U. S. 132.

Uniform recognition of facts of insurance.

This Court has uniformly held that fire insurance is not commerce, we should note, with full knowledge of the facts of this business.

Contractual in nature: In the first place, this Court has repeatedly recognized the strictly contractual nature of fire insurance—that such insurance merely provides a contract to indemnify against loss.

To illustrate, the contract of fire insurance—unlike securities and the tickets in the *Lottery* case—has no intrinsic value which may be sold or exchanged on the market as an article of commerce. Fire insurance only protects the assured named in the contract and only so long as he retains an insurable interest in the property subject to fire risk. Accordingly this Court in *Paul* v. *Virginia*, 8 Wall. (75 U. S.) 168, expressly recognized that insurance, in providing these contracts, does not deal in commodities[1], explaining:

> "These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities" (p. 183).

Fire insurance is totally unlike the Group Health Association in the *Medical Association* case, which afforded all types of medical services, treatment, housing, equipment and other facilities. As this Court stated in *New York Life*

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[1] Incidentally the indictment herein is premised entirely upon the express definition of fire insurance as a "commodity" and thus commerce (par. 11; R. 8). The Government in its present brief apparently has abandoned this completely untenable theory.

Insurance Company v. *Deer Lodge County*, 231 U. S. 495, insurance solely involves:

> "• • • a personal contract, a mere indemnity, for a consideration, against the happening of some contingent event • • •" (p. 508).

Local in nature: In the second place, this Court has recognized the inherently local nature of fire insurance.

Fundamentally fire insurance covers risks of loss to insurable interests in fixed or immovable property and property having a specified location—and thus is intimately related to and interwoven with the property and local laws pertaining thereto in the several states.

The policy of fire insurance is effected through a local agent, as a purely intrastate transaction, and in fact does not become binding until signed by him.[1]

In *Paul* v. *Virginia*, 8 Wall (75 U. S.) 168, this Court emphasized that fire insurance transactions are:

> "• • • local transactions • • • governed by local law" (p. 183).

Again, in the very recent decision of *Hoopeston Canning Co., et al.* v. *Cullen*, 318 U. S. 313, this Court similarly stressed the local nature of fire insurance, pointing out that:

> "The intimacy of the relation of these insurance contracts to the state of New York becomes even more apparent when it is remembered that the property insured is in the state of New York" (p. 318).

In fact, the Government itself (pp. 25-26) recognizes the "local character" of fire insurance in its attempted improvement upon the reasoning in *Paul* v. *Virginia*.

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[1] Par. 18 of the indictment (R. 9). See also *Osborn et al.* v. *Ozlin, et al.*, 310 U. S. 53.

It is true that so-called inland marine insurance, as distinguished from fire insurance, is issued to cover not only property having a fixed location but property which may move from place to place. However, the total inland marine business, including both that on property with a fixed location and that on property which may move from place to place, is relatively insignificant.

This is clearly illustrated by an analysis of the *total* net premiums written on fire insurance and inland marine insurance in the States named in the indictment, for the period of ten years through 1941. In Alabama only 3.2% was collected for *all* inland marine coverage. In Florida, the percentage was only 4.7%, in Georgia, 5.2%, in North Carolina, 3.8%, in South Carolina, 2.8% and in Virginia, 4.3%. In brief, of the total net premiums written in these six southeastern States, approximately 96% was for fire insurance solely against hazards to properties having a fixed location[1]—and 4% was for inland marine in part also against hazards to properties having a fixed location.

That fire insurance customarily relates to property having a definite fixed situs is shown by the "insuring" provision of the standard forms of fire insurance policies. For example, the one adopted in December, 1916 by the National Convention of Insurance Commissioners[2] and used today in many States,[3] reads:

> "• • • against all DIRECT LOSS AND DAMAGE BY FIRE and by removal from premises endangered by fire, except as herein provided, to an amount not exceeding ..... Dollars, to the follow-

[1] Weekly Underwriter, "Record of Fire Insurance by States for 1942" (1943), Appendix A of this Brief.

[2] Proceedings, National Convention Insurance Commissioners, 1916 adjourned meeting, p. 15.

[3] The Spectator, "Fire Insurance Laws, Taxes and Fees, 1942-1943" (1942), p. 26.

> ing described property *while located and contained as described herein*, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from fire, *but not elsewhere*, * * *".

At most an incident to commerce: In the third place, this Court has recognized that insurance at most is an incident to commerce.

This Court has emphasized that this does not make insurance itself commerce. In *Hooper* v. *California*, 155 U. S. 648, for example, this Court flatly denied that marine insurance became commerce merely because it was an incident thereof—stating that any other ruling would ignore:

> "* * * the real distinction * * * between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other" (p. 655).

Likewise in *Thames and Mersey Marine Insurance Company Limited* v. *United States*, 237 U. S. 19, cited by the Government, this Court, while holding that marine insurance was utilized in exportation, specifically recognized that:

> "* * * as this court has said that the insurance business, generically considered, is not commerce * * *" (p. 25).

The inland marine contract, indeed, while in some cases it is an incident of commerce, is as much local as the fire insurance contract. It is a personal contract, made within the borders of a specific State and subject to the laws of that State, for the purpose of indemnifying the assured against contingent losses.

Use of the mails: Finally, this Court has recognized that fire insurance, like other non-commerce activities,

uses the mails, the telephone and the telegraph for the transmission of information, money and papers. It has also noted that fire insurance is a non-commerce activity of large size.

In *New York Life Insurance Company* v. *Deer Lodge County*, 231 U. S. 495, in particular, this Court expressly considered each of these facts and nevertheless held that insurance is not commerce. The *Lottery* case, strongly relied upon by the Government here, was held by this Court not to be applicable.

It was urged in the *Deer Lodge* case that insurance is commerce because of the mode in which the business is conducted in modern times, involving the execution of contracts between people of different States, the transmission of premiums and messages across State lines, and the use of the mails. The size and magnitude of the transactions involved was stressed.

This Court, in rejecting these arguments, ruled:

> "A policy of insurance, the cases declare, is a personal contract, a mere indemnity, for a consideration, against the happening of some contingent event, which may bring detriment to life or property, and its character is the same no matter what the event insured against * * *. Nor does the character of the contracts change by their numbers or the residence of the parties. * * * To accomplish the purpose there is necessarily a great and frequent use of the mails, and this is elaborately dwelt on * * * it being contended that this and the transmission of premiums and the amounts of the policies constitute a 'current of commerce among the States.' This use of the mails is necessary, it may be, to the centralization of the control and supervision of the details of the business; it is not essential to its character" (pp. 508, 509).

In emphasizing that the size and magnitude of the transactions involved did not convert insurance into commerce, this Court said:

> "The number of transactions do not give the business any other character than magnitude" (p. 509).

And, in conclusion:

> "It is contended that *Paul* v. *Virginia* and the cases which follow it must be limited, as it is contended 'the facts therein did limit them, to intrastate, not interstate, contracts,' and that if they be not so limited the *Lottery Case,* 188 U. S. 321, and *International Textbook Co.* v. *Pigg,* 217 U. S. 91, cannot stand.
>
> "The basis of this contention necessarily is the insistence that the contracts in *Paul* v. *Virginia* and the succeeding cases were intrastate contracts while the contracts in the case at bar are interstate contracts. But this is a false characterization of the contracts. The decision of the cases is that contracts of insurance *are not commerce at all, neither state nor interstate"* (p. 510).

Uniform rulings in Sherman Act cases.

This Court, with the full knowledge of the facts of insurance reiterated in this case, has recognized not only that insurance is not commerce but that it is not commerce within the meaning of the Sherman Act.

This Court has not, as the Government would have it believe, confined the pronouncement of that doctrine to cases where it was feared "that otherwise the power of the states" to regulate "could not be sustained" (p. 7).

Thus, in *Blumenstock Brothers Advertising Agency* v. *Curtis Publishing Company,* 252 U. S. 436, this Court, in holding a type of local activity not to be interstate commerce within the meaning of the Sherman Act, referred to

insurance as similarly not being "commerce" within that Act:

> "* * * This [Blumenstock] case is * * * within that line of cases in which we have held that policies of insurance are not articles of commerce, and that the making of such contracts is a mere incident of commercial intercourse" (pp. 442-443).

In *Hopkins* v. *United States*, 171 U. S. 578, this Court, in holding local activity not to be interstate commerce within the meaning of the Sherman Act, also pointed out, as illustrative of the type of business which is not "commerce":

> "* * * contracts of marine insurance are stated not to appertain to interstate commerce * * *" (p. 602).

Similarly, in *National League of Professional Baseball Clubs et al.* v. *Federal Baseball Club of Baltimore, Inc.*, 269 Fed. 681 (Ct. App., D. C. 1920) aff'd 259 U. S. 200, the court, in justifying a holding that baseball is not interstate commerce within the meaning of the Sherman Act, placed insurance in a similar status. The court explained that:

> "* * * the court [has] held that the business of marine insurance was not commerce * * *. So, here, baseball is not commerce * * *" (p. 685).

In *Lown* v. *Underwriters' Association*, C. C. H. Fed. Trade Reg. Serv., Par. 6128 (Sup. Ct., D. C. 1915), the court squarely held that fire insurance is not commerce within the meaning of the Sherman Act. The plaintiff, by a petition in the Supreme Court of the District, sought to restrain the defendants from fixing rates for fire insurance in the District of Columbia. The court denied relief to the plaintiff, holding:

> "The issuing of a policy of insurance is not a transaction of commerce within the meaning of the

clause of the Constitution which provides that Congress shall have the power to regulate commerce with foreign nations and among the several States. *Paul* v. *Va.*, 8 Wall., 168; *Hooper* v. *Cal.*, 155 U. S., 648; *New York Life Insurance Co.* v. *Cravens*, 178 U. S., 389."

The record in the case discloses that an appeal was taken but never perfected.

Again in *Werth* v. *Fire Companies' Adjustment Bureau, Inc.*, 160 Va. 845, 171 S. E. 255 (1933), *certiorari denied*, 290 U. S. 659, the court of last resort of Virginia held that the Sherman Act is not applicable to fire insurance. The plaintiff sought to recover damages from the defendant for an alleged violation of a statute of Virginia which prohibited combinations and monopolies which "would be prohibited and penalized under the provisions of any law of the United States if their activities extended to interstate as well as intrastate commerce." In affirming judgment for the defendant, the court held that fire insurance is not trade or commerce, and therefore that restraint and monopolization of such insurance were not prohibited or penalized by the Federal anti-trust laws, saying:

> "If insurance, and the activities which grow out of it, of which the adjustment of losses is one of the most vital, is not trade or commerce in the statutory sense, then it *is not 'prohibited and penalized' by the federal anti-trust laws*, and, if it is not condemned by those laws, it is not condemned by the Virginia law.
>
> • • • • • • •
>
> "Is insurance, with its attendant or incident activities, comprehended within the term 'commerce' or its synonym 'trade'? It has been repeatedly held not to be by many of the courts of the land, including the Supreme Court of the United States and this court" (171 S. E. 259-260).

Certiorari in this case was denied by this Court (290 U. S. 659).

Finally, in the instant case, the District Court squarely held that:

> "The whole case depends upon the question as to whether or not the business of insurance is interstate trade or commerce, and if so, whether the transactions alleged in the indictment constitute interstate commerce.
>
> *"The Supreme Court has repeatedly held, during a period of seventy-five years, that the business of insurance is not commerce, either intrastate or interstate. They have done so unequivocably and unambiguously.*
>
> • • • • • •
>
> "• • • the finding by the Supreme Court that the business of insurance is not commerce, seems to me to demand a finding that the business of insurance is not 'interstate trade' and is not covered by the Sherman Act" (R. 18-20).

No reversal of uniform holdings.

Defendants respectfully submit that in view of this unbroken line of precedent for 75 years, uniformly acquiesced in and acted upon as controlling law by Congress, the States and the insurance companies, fire insurance should not now belatedly be held to be commerce within the meaning of the Sherman Act.

That "fire insurance is not commerce" arose, according to the Government, "out of the Court's concern that otherwise the power of the states could not be sustained" (p. 7).

However, it now asks this Court to have no such concern—but rather to repudiate this unbroken line of precedent with the admitted effect (as we will subsequently show) of nullifying State regulation.

That this Court does not thus overrule precedent, inevitably resulting in basic changes of policy and readjustment of laws, is clearly established in *New York Life Insurance Company* v. *Deer Lodge County*, 231 U. S. 495, wherein it was said:

> "If we consider these cases numerically, the deliberation of their reasoning, and the time they cover, they constitute a formidable body of authority and strongly invoke the sanction of the rule of *stare decisis*. This we especially emphasize, for all of the cases concerned, as the case at bar does, the validity of state legislation, and under varying circumstances the same principle was applied in all of them. For over forty-five years[1] they have been the legal justification for such legislation. To reverse the cases, therefore, would require us to promulgate a new rule of constitutional inhibition upon the States and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision" (p. 502).

Authorities cited by Government.

The Government, in requesting a reversal of this long line of insurance cases, argues that "commerce" has an unlimited meaning and accordingly must embrace fire insurance. "All agree", says the Government, "that 'commerce' embraces every phase of commercial and business activity, and that this includes insurance" (p. 8).

The Government asserts that merely because fire insurance involves on a large scale "the movement of money, information, and documents" across State lines—and what local activity does not today—*ipso facto* fire insurance is interstate "commerce" subject to controlling federal rather than State regulation (pp. 6-7).

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[1] It is now over 75 years.

The Government, however, is unable to cite a single decision of this Court holding that "commerce" could or does embrace fire insurance. To analyze briefly the decisions selected and cited by the Government as leading, in its summary of argument (pp. 6-11):

(a) *Paul* v. *Virginia*, 8 Wall (75 U. S.) 168 (p. 7), cited by the Government, held squarely that fire insurance is not commerce (8 Wall. 183).

(b) *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (p. 7), likewise cited by the Government, ruled that the business of preparing, printing and publishing a magazine is peculiarly local (303 U. S. 258). In the course of this Court's reasoning *Paul* v. *Virginia* and other insurance cases were cited as authoritative, thereby if anything demonstrating that this Court continued to view fire insurance as not commerce (303 U. S. 253).

(c) *Gibbons* v. *Ogden*, 9 Wheat. (22 U. S.) 1 (p. 8) held merely that navigation is commerce (9 Wheat. 189-90). This Court nowhere suggested that fire insurance is commerce. Indeed when the *Gibbons* case was subsequently cited by counsel in *Paul* v. *Virginia* (8 Wall. 172), which dealt with insurance, this Court disregarded the case as not applicable. Subsequently this Court distinguished insurance on a ship from the ship itself, in *Hooper* v. *California*, 155 U. S. 648, holding that whereas a ship engaged in navigation is engaged in commerce the insurance taken out by the shipper is not commerce.

(d) *Champion* v. *Ames*, 188 U. S. 321 (p. 8) held merely that lottery tickets are subjects of traffic among those who choose to sell or buy them and thus that their carriage from one State to another is commerce (188 U. S. 353-4). The Court nowhere ruled there that fire insurance is a subject of traffic bought and sold on the market—having already held to the contrary in *Paul* v. *Virginia*—and thus in no-

wise ruled on fire insurance as commerce. This Court squarely held subsequently in *New York Life Insurance Company* v. *Deer Lodge County* that the *Lottery* case is not applicable to insurance (231 U. S. 510-11).

(e) *American Medical Association* v. *United States*, 317 U. S. 519 (pp. 8-9) held solely that an organization supplying doctors, beds, nurses, medicine, medical equipment and other facilities is engaged in commerce within the meaning of Section 3 of the Sherman Act (317 U. S. 526, 528). The Court nowhere discussed either (1) fire insurance, which is completely distinguishable from a medical association in that fire insurance merely provides indemnity against loss, or (2) the meaning of "commerce" in Sections 1 and 2 of the Sherman Act. A company may be engaged in "commerce" under Section 3 of the Act without being engaged in "commerce" under Sections 1 and 2. *Atlantic Cleaners & Dyers Inc.* v. *United States*, 286 U. S. 427, 433-435 (1932)[1] and the opinion of the court below (R. 19).

(f) *Thames and Mersey Marine Insurance Company* v. *United States*, 237 U. S. 19 (pp. 8-9) unequivocally recognized that marine insurance, while used by the export trade, is generically not commerce (237 U. S. 25-26).

(g) *German Alliance Insurance Company* v. *Kansas*, 233 U. S. 389 (p. 9) upheld State regulation of fire insurance. The Court impliedly recognized that fire insurance is not commerce, because it ruled that insurance is "for indemnity against loss and is personal" (p. 411)—a far cry from commerce.

(h) *Kidd* v. *Pearson*, 128 U. S. 1 (p. 9), held that manufacturing is not commerce (p. 20). This Court has subsequently held that manufacturing is subject to the commerce power of Congress, on the ground that it affects commerce, but this Court has not held that manufacturing is *per se* commerce. This case, if authority for anything, would be authority against holding fire insurance to be commerce.

(i) *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290 and *Northern Securities Company* v. *United States*, 193 U. S. 197 (p. 10), held that the Sherman Act is to be applied literally, without exception, to each and every restraint of trade and commerce—a holding subsequently overruled in *Standard Oil Co.* v. *United States*, 221 U. S. 1, 64 *et seq.* These cases do not hold that the Act applies to any activity which is not commerce—such as fire insurance—but merely that it applies to activities which are clearly interstate commerce, namely, interstate railroads.

[1] Here again the Government (pp. 39-40, footnote 54), in accordance with the fundamental theory of its entire brief, requests this Court to disregard its ruling in the *Atlantic Cleaners & Dyers Inc.* case on the ground that it "cannot be supported".

II.

Congress Has Accepted and Approved the Supreme Court Decisions That Fire Insurance Is Not Commerce.

Government argument.

The Government, in support of its contention that fire insurance is "commerce" within the meaning of the Sherman Act, refers to allegedly favorable Congressional history.

The Government states that "The Court's treatment of the Sherman Act as going to the limits of the commerce power is fully supported by the Act's legislative history" (p. 73), and that "Congress intended the Sherman Act to exercise all of its commerce power under the subject regulated" (p. 76), thus leaving "the Courts with freedom to exercise their usual prerogative in determining whether or not to adhere to prior decisions" (p. 80).

The Government seeks to imply from this that Congress intended the Sherman Act to apply to fire insurance.

Congressional views on Sherman Act.

Even a superficial analysis of Congressional history reveals the fact that Congress has consistently acted on the assumption that fire insurance is not commerce—whether under the Sherman Act or otherwise.

Thus when the Senate was debating the enactment of the Sherman Act, Senator Turpie of Indiana specifically called attention to the fact that the word "commerce" did not include insurance in view of the ruling on that subject by the Supreme Court.

Said the Senator:

> "The Senator from Missouri (Mr. Vest) spoke the other day about the difficulty of defining the word 'commerce', especially as contained in the phrase 'interstate commerce'. I recollect one judicial decision upon this subject very definitely. The Supreme Court has decided that insurance is not commerce * * *" (21 Cong. Rec. 2556).

Congress thereupon passed the Sherman Act in 1890 without attempting, by definition or otherwise, to include insurance.

Subsequently, after this Court in the *Deer Lodge County* and similar cases had reaffirmed that insurance is not commerce, Congress exhaustively reviewed its anti-trust legislation.

During the debates on this revision, eventually known as the Clayton Act, Representative Webb expressly pointed out that:

> "* * * insurance companies are not reached, as the Supreme Court has held that their contracts or policies are not interstate commerce" (51 Cong. Rec. 9390).

Congress then passed the Clayton Act in 1914 without making the slightest attempt to apply it to insurance.

Again in 1937 Congress once more amended the anti-trust laws, specifically Section 1 of the Sherman Act,[1] without disturbing the settled view that the anti-trust laws did not apply to insurance.

This legislative record can only be construed as an understanding or acquiescence by Congress in the view that fire insurance is not—and was not intended to be—"commerce" within the coverage of the anti-trust laws.

Cf. *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320, 336.

Congressional views opposing any federal legislation.

Congress indeed has refused repeatedly to approve any federal legislation applying to fire insurance.

Rather Congress has concurred fully with this Court's rulings that insurance, not being commerce, properly should be left with the States, free of federal interference.

In 1866 a bill was introduced in the House[2] providing for the creation of a national bureau of insurance as a subordinate part of the Treasury Department. This bill was not passed.

In 1892, a bill was introduced in the House[3] to create the office of Commissioner of Insurance. That bill was never reported out of Committee.

In 1897, a bill was introduced in the Senate[4] to declare that insurance companies operating outside of the States of their incorporation were to be deemed engaged in interstate commerce. That bill was never reported out of Committee.

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[1] Act of August 17, 1937, c. 690, Title VIII, 50 Stat. 693.

[2] H. R. 738, 39th Cong., 1st Sess., June 29, 1866.

[3] H. R. 9629, 52nd Cong., 1st Sess.

[4] Senate Bill 2736, 55th Cong., 2nd Sess.

In December, 1904, President Theodore Roosevelt, in his message to Congress, suggested that careful consideration be given to whether the constitutional powers of Congress with respect to commerce extended to transactions in insurance.

Shortly thereafter, a bill was introduced in the Senate[1] by Senator Dryden to establish a Bureau of Insurance in the then recently created Department of Commerce and Labor. The bill died in Committee.

Again in 1905, President Theodore Roosevelt, in his message to Congress, discussed the question of regulating interstate insurance transactions. Consideration of this portion of his message was referred to the Committees on the Judiciary of the House and the Senate.

The report of the House Judiciary Committee, in recommending no action, stated[2]:

> "The question as to the power of Congress to regulate and control insurance corporations created by the States has been squarely and fully presented to the Supreme Court of the United States, and the court has many times held that insurance is not commerce, and that Congress has no power to regulate insurance corporations or their business. *The views of the Supreme Court have practically met the approval of the bar and business men of the United States as being in accordance with law and common sense* (p. 14).
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> "If there was any doubt upon the subject, it has been dispelled by the argument made for Federal control. All at once it is voiced throughout the nation that a way out of the difficulty has been discovered, and the happy thought is suggested that Congress can declare insurance to be commerce;

[1] Senate Bill 7277, 58th Cong., 3rd Sess.

[2] H. R. Rep. No. 2491, 59th Cong., 1st Sess., March 23, 1906.

and that on account of the great interests involved the Supreme Court will reverse itself and the law of the nation and hold the legislation constitutional. *The suggestion is not very complimentary to the Supreme Court that, on account of great interests involved, that tribunal would reverse its decisions for a century, absolutely wipe out and destroy the police powers of the States that have so many times been upheld by that court*" (p. 18).

The Senate Committee on the Judiciary made a similar recommendation[1].

In 1914 and 1915, resolutions were introduced in both the House and the Senate proposing an amendment to the Constitution to the effect that "the Congress shall have the power to regulate the business or commerce of insurance throughout the United States and its territories or possessions." The resolutions were submitted to the Committees on the Judiciary of both the House and the Senate.[2] No report was made on the resolutions by either Committee.

In 1933, Senator Robinson of Indiana introduced a resolution[3] calling for an amendment to the Constitution giving Congress the power to "regulate the business or commerce of insurance throughout the United States and all territories subject to the jurisdiction thereof." That resolution died in Committee.

As a sidelight upon consideration in Congress of statutes relating to insurance, it is to be noted that the 1940 platforms of both the Democratic and Republican parties

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[1] Sen. Rep. No. 4406, 59th Cong., 1st Sess., 1906.

[2] S. J. Res. 103, 63rd Cong., 2nd Sess.; H. J. Res. 194, 63rd Cong., 2nd Sess.; S. J. Res. 58, 64th Cong., 1st Sess.

[3] S. J. Res. 51, 73rd Cong., 1st Sess.

contained planks upholding State—as distinguished from Federal—regulation of insurance.[1]

Since Congress has considered but refrained from enacting legislation specifically directed toward the insurance business, acquiescing willingly in the rulings of this Court that fire insurance is not commerce, we respectfully submit that it would amount to judicial legislation to hold that the Sherman Act encompasses that which Congress has refused to regulate by specific laws.

As emphasized in *Kirschbaum Co. v. Walling*, 316 U. S. 517:

> "* * * The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when the Federal government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment *to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation*" (p. 522).

Department of Justice views.

It is well to note that not only Congress, but the Department of Justice, believed until this suit that fire insurance is not commerce within the meaning of the Sherman Act.

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[1] The Democratic platform contained the provision:

> "We favor strict supervision of all forms of the insurance business by the several States for the protection of policyholders and the public."

The Republican platform contained the provision:

> "We condemn the New Deal attempts to destroy the confidence of our people in private insurance institutions. We favor a continuance of regulation of insurance by the several States."

The Government concedes that the Department considered the law to be so clear on the subject that its "failure to apply the Act to insurance" was "under the compulsion of decisions" (p. 98). Even today, the Department's opinion of the existing law is that a "barrier to application of the Sherman Act to the insurance business has been erected by the judiciary" which "only the judiciary can remove" (p. 99).

The instant indictment represents the *first* effort by the Government to apply the Sherman Act to insurance since that Act became law in 1890. This failure for over fifty years to attempt to apply the Act to the business of insurance clearly points to the conclusion that Congress, the Department and the courts uniformly viewed the Act as not so applying, and emphasizes the injustice of now suddenly so applying it.

The significance of this absence of administrative action is well illustrated in *United States* v. *Cooper Corporation et al.*, 312 U. S. 600. This Court there held that Section 7 of the Sherman Act did not confer upon the United States a civil right of action for treble damages. In the course of the opinion, Mr. Justice Roberts pointed out:

> "It is significant that, in the light of the expressions by the courts, the supplemental legislation, and the legislative history, no action has ever been brought by the United States under §7 in the fifty years during which the statute has been in force until the present action was instituted. • • • In the meantime the World War intervened with the Government a purchaser of enormous quantities of material and supplies. Then, as now, the complaint was prevalent that agreements and conspiracies existed to fix and maintain prices of materials needed by the Government. And throughout the life of the legislation able

and vigilant officials devoted to enforcement of the policy of the Sherman Act have not been wanting.

"In these circumstances the conviction that no right to sue had been given the Government, rather than a supine neglect to resort to an available remedy, seems to us the true explanation of the fact that no such actions have been instituted by the United States" (pp. 613-614).

Similarly, in *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349, this Court, in holding that Section 5 of the Federal Trade Commission Act did not give the Commission power to prohibit unfair methods of competition in wholly intrastate transactions, stressed that the failure of the federal enforcement agencies to proceed against local activities indicated that they had no power to do so:

"That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, *so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred*" (pp. 351-352).

If the Department had believed that fire insurance is commerce within the scope of the Sherman Act, undoubtedly appropriate action would have been taken. As this Court itself pointed out in the *Cooper* case, above quoted:

"* * * throughout the life of the legislation able and vigilant officials devoted to the enforcement of

the policy of the Sherman Act have not been wanting" (p. 614).

Theory of unlimited delegation.

There certainly is no justification whatever, in view of this history of the enactment and enforcement of the antitrust laws, for the contention advanced by the Government that Congress had no particular views on fire insurance and accordingly enacted a mere Sherman "principle" which the courts were or were not to apply to fire insurance in their uncontrolled discretion.

The Government sweepingly asserts with respect to the application of the Sherman Act that:

> "* * * the proposed legislation was a mere statement of principle from which the courts would determine the scope of the Act.
>
> "* * * Congress was not as a matter of legislative intention attempting to bind the Court to the tenets of its prior decisions, or to deprive it in this field alone of its frequently exercised privilege of changing its mind" (pp. 77-9).

We submit that Congress had neither the intention nor indeed the power, in abdication of its legislative functions, to enact a mere "Sherman Principle" and to authorize the courts to apply that "Principle" to fire insurance if and when they saw fit. Every manifestation of Congressional intent leads uniformly to the conclusion that Congress employed the word "commerce" in the Sherman Act in the sense then known and accepted—namely to the exclusion of fire insurance. Surely in view of this Congressional intent the word "commerce" in the Sherman Act cannot now be expanded beyond this Congressional meaning to conform to the Department of Justice's current views.

Authorities cited by the Government.

The miscellaneous Congressional history cited by the Government is so irrelevant as scarcely to merit attention. If anything, it demonstrates Congressional intent not to regulate insurance as commerce.

(a) *General statements by members of Congress* (pp. 73-78). The Government refers to general statements by members of Congress that the Sherman Act was intended to exercise all of Congress' power over the subject. However, as noted above, Congress at the time of enactment was apprised of the fact that this Court had held insurance not to be "commerce" within its power, and had willingly acquiesced in the view that the Sherman Act was not to apply to insurance. Its responsible committees thereafter repeatedly concurred in the Supreme Court decisions on the subject.

(b) *Commerce and Labor Act* (p. 86): The Government refers to this Act, now repealed, which when presented to Congress provided for (1) a federal Bureau of Insurance and (2) the collection of data on corporations engaged in interstate commerce.[1] Congress, however, voted down the proposed federal Bureau of Insurance, merely adding to the provision for collection of data, a rider providing that insurance data should also be collected.[2]

(c) *Merchant Marine Act* (pp. 89-92): This Act, likewise referred to by the Government, expressly

[1] 36 Cong. Rec., Part I, p. 919.

[2] The only discussion with reference to the rider covering insurance data was as follows (36 Cong. Rec., Part 2, p. 2008):

"Mr. Bartlett: I desire to ask the gentleman if this report—and I have read it very carefully—in reference to insurance companies does anything more than to authorize the Commissioner to gather statistics in reference to insurance companies?

"Mr. Hepburn: Nothing in the world, so far as I understand."

exempted one phase of marine insurance from the anti-trust laws. Congress believed that specific anti-trust exemption of any phase of insurance was unnecessary, as insurance is not commerce, but when presented with the question on this one occasion promptly inserted the exemption on the theory that it could do no harm. To refer to the Committee recommendation[1] with respect to this exemption:

"* * * even if unnecessary, [it] can do no harm * * *".

III.

The States Have Curtailed Competition In Fire Insurance In Reliance Upon The Supreme Court Decisions That Fire Insurance Is Not Commerce.

Government argument.

The Government frankly concedes the obvious, namely that if fire insurance is held to be "commerce" within the meaning of the Sherman Act, inconsistent State regulation must fall.

The Government specifically discusses twenty-one States, listing: (a) five whose laws, according to the Government, clearly would be nullified if the Sherman Act be applied to fire insurance, (b) eleven more whose laws thus might be nullified and (c) five others whose laws "might" be sustained (p. 130).

The Government accepts as unquestioned that "State laws could not, of course, stand to the extent that they are inconsistent with a valid Federal statute" (p. 126). It

[1] Report on Status of Marine Insurance in the United States by S. S. Huebner; Including Recommendations of Sub-Committee on Merchant Marine and Fisheries (1920, Washington, GPO) 78.

bluntly brushes aside this destruction to State regulation, however, as not even a "relevant consideration" (p. 126). It argues that all State regulation of fire insurance would not be nullified, under this principle, but insists that even if it were so nullified "it is for Congress and not the states" to govern here—condemning any subordination of the Sherman Act "to the policies of the states" (p. 123).

State regulation of fire insurance.

There can be no question but that present day State regulation of fire insurance would be nullified by application of the Sherman Act to such insurance.

In reliance upon the decisions of this Court holding fire insurance not to be commerce, the States have developed detailed systems for regulating that business.

Their experience over the years has established that unrestricted competition in fire insurance is opposed to the public interest, since it results in financial chaos, public injury and, in some instances, in a greater centralization of power. Accordingly upon the basis of this experience, present day State regulation follows a comprehensive pattern curtailing competition and encouraging uniformity of rates in direct contrast to the unrestricted competitive demands of the Sherman Act. State regulation and the Sherman Act are diametrically opposed to each other—and cannot exist side by side.

This State curtailment of competition was accurately recognized and approved by Mr. Justice Frankfurter in *Osborn et al.* v. *Ozlin et al.*, 310 U. S. 53 as follows:

> "Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissi-

tudes of life *have long been withdrawn from the benefits and caprices of free competition*" (p. 65).

Inception of State regulation.

State regulation had its inception over ninety years ago when New Hampshire in 1851,[1] Massachusetts in 1852[2] and Rhode Island in 1855[3] each established a Board of Insurance Commissioners.

By 1890, when the Sherman Act became law, eighteen States had established independent insurance departments.[4] However, State regulation, as known today, had then just begun to develop.

State anti-compact laws.

At first, a number of States felt that the public would be served best by unrestricted competition in the formulation of premium rates.

In twenty-two States, this trend of thought crystallized in the enactment of anti-compact laws prohibiting combinations between insurers for the joint fixing of rates.[5]

But by 1911, many States began to realize that unlimited competition not only failed to benefit the public,

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[1] N. H. L. 1851, Chap. 1111.

[2] Mass. L. 1852, Chap. 231.

[3] R. I. L. 1854, Sec. 17.

[4] Patterson, "The Insurance Commissioner in the United States" (1927), p. 536, note 62.

[5] Alabama, Arkansas, Georgia (modif. form), Iowa, Kansas Louisiana, Maine, Michigan, Mississippi, Missouri, Nebraska, New Hampshire (only as to foreign insurance companies), Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington and Wisconsin (*Cyclopedia of Insurance in the United States*, 1910-1911, pp. 31-46). Arizona, Ariz. Code Ann. (1939) Vol. 5, Secs. 74-101.

but actually injured it. This is brought out by the Legislative Committee reports and other authorities hereinafter discussed.[1] The injurious consequences of unrestricted competition assumed real significance. Competition instead of being the "life of the business" more closely approximated its death knell.[2]

Five of the States having anti-compact laws formally repealed them.[3] Of the remaining seventeen States, eleven[4] have restricted their anti-compact laws by requiring or permitting fire insurance companies to become members of rating bureaus which through joint action establish for

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[1] For example, the 1911 Report of the Joint Committee appointed by the Senate and Assembly of the State of New York, hereinafter referred to as the Merritt Committee Report, stated:

> "The actual working of anti-compact laws has not been satisfactory; they have not decreased rates and they have greatly increased discrimination; they have taken the rate-making out of the hands of the companies, who were in direct contact with the business and put it in the hands of persons who had no way of testing by experience the rates which they made, and who furthermore did not stand in such relation to policy-holders as to feel the force of public opinion.
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> "It is well recognized that in general anti-compact laws have been a failure and there is noticeable a distinct reaction against them" (p. 44).

[2] Huebner, *Property Insurance*, pp. 347-348 (3rd Ed., 1938); 2 Gephart, *Principles of Insurance* (1917), p. 319.

[3] Alabama, No. 359, Acts of Alabama 1923; Maine, Chap. 26, Laws of 1895; Mississippi, Chap. 182, Laws of 1926; Tennessee, Chap. 33, Act of General Assembly 1919; Virginia, Chap. 602, Act of Assembly 1902.

[4] Arkansas, Pope's Dig. of Ark. Stat. (1937), Vol. 2, Sec. 7722; Kansas, Gen. Stat. of Kan. (1935), Sec. 40-922; Louisiana, Dart's La. Stat. Ann. (1939); Vol. 3, Sec. 4222(1); Michigan, Mich. Stat. Ann. (1937), Vol. 17, Sec. 24.52; Missouri, Mo. Rev. Stat. Ann. (1939), Vol. 15, Sec. 5972; Ohio, Page's O. Gen. Code, Vol. 6, Sec. 9592-1; Oregon, Ore. Comp. Laws of 1940, Vol. 7, Sec. 101-1605; South Carolina, S. C. Code (1942), Vol. 4, Sec. 8008; South Dakota, S. D. Code (1939), Vol. 1, Sec. 31.3701; Washington, Remington's Rev. Stat. of Wash. (1932, 1940 Supp.), Vol. 8, Sec. 7119; Wisconsin, Wis. Stats. (1939), Sec. 203.33.

members uniform fire insurance rates for like hazards, in like localities, with like exposures and occupancies.

This reversal by the States of their former efforts to compel unlimited competition demonstrates their experience that uniformity rather than competition in fire insurance best serves the public interest. Today, anti-compact or anti-trust laws in so far as fire insurance is concerned are generally considered a thing of the past.

This view is aptly expressed in Patterson, *The Insurance Commissioner in the United States* (1927), wherein the author, referring to anti-compact laws, succinctly states:

> "These statutes represent the obsolescent theory that rates should be kept low by compelling competition and repressing all movements to eliminate competition" (p. 155).

Wandel, in *The Control of Competition in Fire Insurance* (1935), generally summarized this State experience with competition in fire insurance as follows:

> "Throughout the years of legislation antagonistic to the control associations, it gradually became evident that such inimical laws were seldom if ever effective, that abuses existed under them, that competition through rate-cutting and the payment of excessive commissions was not in fact desirable and that, on the contrary, it was desirable for companies to combine their experience for purposes of rate-making" (p. 133).

State experience now hostile to competition.

Today, the overwhelming majority of States, after years of experience, curtail competition in fire insurance, in direct contrast to the unlimited competitive demands of the Sherman Act. Their experience in regulation, gained through

the painful process of trial and error, has caused the States to be justly proud of their insurance statesmanship—and they resent and strenuously object to any belated federal interference.

Their experience has taught the States that unlimited competition in fire insurance—as distinguished from other businesses—leads to: (1) insolvency of insurers which in turn injures the assured public since they will not only have paid out their money for nothing but, worse, will have relied in ignorance on a worthless indemnification; (2) competition going to greater extremes than in other businesses; (3) increased fire losses due to failure to take proper precautions to minimize hazards; (4) discrimination in favor of the influential assured whose business is sought rather than the average assured; and (5) a greater concentration of wealth and power in the larger, at the expense of the smaller, companies.

The light-hearted theoretical reasoning of the Government here cannot stand against these considered judgments—reached by many independent investigations by State authorities—after years of bitter experience.

Illustrative of this State experience are the following:

New York, speaking through the 1911 Report of the Merritt Committee,[1] discussed each of the results above listed (Nos. 1-5) in detail:

(1) *Insolvency of insurers:*

"We have now to consider the effect of open competition in fire insurance. It is not necessary to

[1] The Report of the Insurance Commission for the Province of Ontario, Canada (1919) makes the following statement with reference to the Merritt Committee report:

"It is generally conceded that the work of this committee constituted the most thorough and complete enquiry ever undertaken, and that their report is the most valuable compendium of results and conclusions ever put together on the subject referred to them."

theorize about this for there is plenty of evidence in the rate wars which were formerly carried on and which to some degree still prevail. The universal effect of such periods of open competition wherever and whenever they have occurred has been a cutting of rates to a point that was below the actual cost of the indemnity. If the rate war had been general this would have meant the ultimate death of the company, and rate wars of even a local character lead, if long continued, to the dissolution of the smaller and weaker companies. The effect on all companies is weakening. The policy-holder, to be sure, gets his insurance very cheaply; too cheaply, for the weakening of the companies is not in the long run and on the whole an economic good. * * * It has not done the policy-holder any good to get cheap insurance if, when the test comes, the protection is found to be worthless" (p. 41).

(2) *Competition going to extremes:*

"The question occurs to one whether there cannot be open competition that does not go to an extreme, such competition as there is in, for instance, the grocery business or the shoe business. The distinction seems to be this: the grocer has very clearly in mind what his goods have cost him and what price he must get for them if he is to escape a loss, and he will not, except in an extremity, sell at a loss. The underwriter, on the other hand, is selling indemnity against something that may never occur, so, however low his price, there is always some possibility that he will escape without a loss; at any rate he can gamble on the chance. What corresponds to the point below which the grocer dare not go without a loss is the average loss experience on the class to which the risk belongs. But this is not easily ascertained; at any rate it does not stare the underwriter in the face in the same way that the buying price of sugar confronts the grocer" (p. 42).

(3) *Increased fire losses:*

"The beneficial effects of schedule rating have been demonstrated by the rise in the burning ratio which follows a period of demoralization in rates. During a rate war schedule rating is of course abandoned. It then follows that untidy conditions or the absence of a watchman will not be penalized through the rate, and so rubbish is allowed to accumulate, the watchman is taken off, and there is a general lowering of tone which manifests itself in an increased burning ratio" (p. 50).

(4) and (5) *Discrimination and concentration:*

"It has been demonstrated by the experience of all times and all places that open competition in fire insurance is an unstable condition which leads to the general weakening of the companies, and eventually to the elimination of small companies, further that under open competition there is always discrimination in favor of the policy-holder with influence" (p. 76).

New York, speaking again in 1942 through its Superintendent of Insurance:

"If we were to have unrestricted competition today, the result would undoubtedly be that a few large companies which could afford to cut rates would get the business and many of the smaller companies would be forced out."[1]

Illinois, in the 1911 Report of its Fire Insurance Commission to the Legislature, found:

"That this competition has inured to the benefit of corporations, trusts, and large property values generally, at the expense of small property owners, has been demonstrated in many States where anti-

[1] Pink, *The Problem of Fire Rates* (1942), p. 2.

compact laws have longest sought to enforce open competition and by the fact that recently three States, Kansas, Texas and Louisiana, where these laws have been longest in force, have reversed their legislative theories and enacted laws compelling the fire companies to file their schedules, under heavy penalties for discrimination. A comparative examination of the laws and rates of the several States fails to show any benefits that have accrued to the public in the States that have enacted anti-compact laws * * *" (p. 21).

Kentucky, speaking through the 1916 report of its Fire Insurance Commission to the Governor and General Assembly:

"The Commission is satisfied that the progress of rate regulation heretofore outlined plainly points to the desirability of requiring the companies to make and assume the responsibility for the rates in the first instance giving to the State officers the fullest supervision, requiring co-operation in rate-making for efficiency and economy, equal treatment to all co-operating companies, the avoidance of discrimination between persons and properties insured, and finally the substitution of a just rate for an unjust rate where the facts are established by evidence" (p. 20).

Maine, speaking through the letter of its Insurance Commissioner to Senator Van Nuys, dated October 4, 1943,[1] stated:

"For years State regulation of insurance has been the accepted practice. State regulation aims at controlling competition and preventing unfair discrimination. State regulation puts the emphasis on

[1] Joint Hearing before the Subcommittees of the Committees on the Judiciary, 78th Cong., 1st Sess., on S. 1362 and H. R. 3269, 3270, p. 240.

solvency of companies as the best protection to policyholders. Federal antitrust laws would permit unrestricted competition which could lead to failure of many insurance companies, penalizing thousands of policyholders."

Michigan, speaking in 1943 through David A. Forbes, its Insurance Commissioner,[1] explained:

"In 1917 our legislature enacted our 'Fire Rating Bureau' laws, which resulted in the orderly conduct of the fire insurance business in this state. Previously, there had been discrimination in rates, the large buyer of insurance usually being able to buy his insurance cheaper than the small buyer. Free and open cutthroat competition also often resulted in the insolvency of fire insurance companies.

"Since 1917 these two evils have disappeared. The public is protected by the Commissioner of Insurance as to rates because he is given power through the fire rating division within his department to check and investigate rates charged in this State, and if he determines that such rates are excessive he has the power to suspend those rates and to substitute other rates. Within the past two years the Commissioner of Insurance of this state ordered a 7% reduction in dwelling rates.

"Furthermore, rates today in Michigan are materially lower than they were in 1917.

"If the Department of Justice's apparent views on the subject of fire insurance rates were to be upheld, then our Fire Rating Bureau laws would be in violation of the Federal laws. It would mean the return of the evils existing in this business in this state prior to 1917 to the detriment of the citizens of Michigan."

North Carolina, speaking through the May, 1926 Address of Insurance Commissioner Wade delivered at the

[1] The Eastern Underwriter, December 3, 1943, p. 8.

annual meeting of the Chamber of Commerce of the United States stated:

> "It is in the interest of the policyholder that the companies be allowed to cooperate in the making of rates" (p. 7).

Referring to anti-compact laws, the speaker proceeded:

> "Laws of this type are detrimental to the progress of insurance and certainly should be looked upon as obstructions to progressive service" (p. 7).

North Dakota, speaking through the letter of its Governor to Senator Van Nuys, dated October 12, 1943,[1] declared:

> "There has been built up in North Dakota, a considerably large body of insurance laws, regulating the business of insurance in this State. A number of fire-insurance companies have joined in establishing a joint bureau of inspection of fire risks, recommending and establishing uniform rates, based upon such investigations. This has worked very satisfactorily in North Dakota, and has resulted in uniformity and stability in the insurance business.
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> "I can see no reason why insurance companies should be prohibited from joining together, in making investigations of fire risks through one established agency, and in basing insurance rates upon the findings of such agency. To my way of thinking that is good business, and further, it serves to protect the public fully.'"

Pennsylvania, speaking through the 1913 Report of its Joint Legislative Commission:

> "While it is undoubtedly true that no system of ascertaining rates or prices to be charged for fire

[1] Joint Hearing before the Subcommittees of the Committees on the Judiciary, 78th Cong., 1st Sess., on S. 1362 and H. R. 3269, 3270, pp. 75-76.

> insurance has given unqualified satisfaction to all parties concerned, and probably no such system ever will give entire and unqualified satisfaction to everyone, yet the system hereinbefore described seems to be more scientific, exact, impartial and just,—both to insurer and insured,—than any other that has yet been devised. It gives to the insured an exact knowledge of the conditions of his property upon which the charges are based, together with an opportunity of bettering his rate by improving the character and condition of his risk." (p. 31).
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> "In conclusion, your Commission finds from the testimony adduced before it from all sources, both from the insurer and the insured, as well as that of recognized experts in the fire insurance business, that such combinations of insurance companies, or their representatives or agents, are in accordance with a wise public policy, are necessary to the solvency of the insurance companies and are beneficial to the public" (p. 53).

Florida, speaking through its Supreme Court in *Brock* v. *Hardie*, 114 Fla. 670, 154 So. 690 (1934), held that the business of fire insurance and the operation of a State rating bureau did not come within the prohibitions of the Florida Anti-Trust Act.

Missouri expressed the following view in the report of its Fire Insurance Commission appointed in 1913:

> "It is in the interest of the public, the companies and policy holders that the rate be apportioned to the hazard and all property properly classified and all risks of substantially the same hazard be given the same rate" (p. 49).

Virginia, through the 1929 opinion of its State Corporation Commission, said:

"It is a well known fact that business conditions suggest the advisability of the application of common rates by all insurance companies upon the same classes of risks within any given territory. Recognizing this fact, the act here in question (Ch. 433, Acts 1928) requires all fire insurance companies subject to the act to file their rates through the "Virginia Insurance Rating Bureau", and clearly contemplates that the same schedule of rates will be filed by the Virginia Insurance Rating Bureau for application in Virginia by all fire insurance companies required to file their rates through the bureau; and that these common rates shall be based upon the composite or aggregate Virginia experience of all fire insurance companies subject to the act, and not upon the individual experience of some one company." (p. 35)

Wisconsin, speaking through the 1913 report of its Fire Insurance Investigating Committee, stated:

"Competition does not, as is sometimes argued, make for cheaper fire insurance. On the contrary, competition increases the expense of business and in the long run the insured pays the cost. Fairness in determining the rate, and economy and efficiency in its application, require the coöperation of all rate-making machinery. There are two ways in which this may be done: (1) state rating, and (2) coöperative rating by the companies.

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"Enforced competition has proved a total failure so far as it affects the great mass of the insured" (pp. 46-47).

Texas, speaking through Insurance Commissioner Love, declared:

> "In my opinion, competition in fire insurance rates is illogical, opposed to sound public policy and undesirable from every standpoint" (p. 11)[1].

Similarly, the Province of Ontario, Canada, in a Report on the Insurance Commission by the Honorable Mr. Justice Masten, presented on January 18, 1919, found:

> "It is a matter of experience that unrestricted competition between insurance companies has inevitably led to rate-cutting, and eventually to the failure or absorption of the weaker companies in the field. On the surface open competition may for a time appear to be in the public interest by reducing the insurance cost, but even this is a doubtful benefit, owing to the discrimination in favour of large and influential insurers, which may, and undoubtedly does, prevail under such conditions" (p. 12).

This general condemnation of unlimited competition, based on experience and study, is also expressed in the 1915 Report adopted by the National Convention of Insurance Commissioners as follows:[2]

> "The requirements of safety and economy both make inapplicable to insurance the anti-monopoly, anti-trust and anti-compact laws looking toward unrestricted and open competition" (p. 20).

Similarly, in 1923, the National Convention of Insurance Commissioners adopted a resolution,[3] which stated:

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[1] Dean, The Philosophy of Fire Insurance (1925), Vol. III, p. 11.

[2] Proceedings, National Convention Insurance Commissioners 1914 adjourned meeting, pp. 16-25.

[3] Proceedings, National Convention Insurance Commissioners 1923 meeting, p. 165.

"WHEREAS, the public is directly benefitted by the reduced cost to the companies of rate making by co-ordinated effort; and,

"WHEREAS, such co-ordination tends to make fire insurance rates equitable as among assureds and to eliminate discrimination between policyholders; therefore, be it

"RESOLVED, That all the several States be urged to repeal laws or regulations now prohibiting such co-ordination in rate making and to substitute therefor statutory consent to fire insurance companies to join together in the economical application of a non-discriminatory standard of rate making."

To summarize the case in the words of the Merritt Committee Report:

"* * * the effect of a period of sustained open competition is the procuring by the public temporarily of cheaper insurance; this advantage mostly falls to persons of influence; the quality of the protection is lowered since the companies are weakened. Furthermore, if the process continues long enough some of the smaller companies will be forced to retire and their business will be absorbed by the large companies" (pp. 41-42).

That informed opinion has approved the departure by the States from the competitive theory of the anti-trust laws, as the result of years of experience and study, is shown by the quotations from leading text writers on insurance set forth in Appendix B of this brief.

State curtailment of competition.

The States through their Legislatures have adopted these conclusions that co-operation, not competition, in fire insurance best serves the public interest and, as the

result, have developed comprehensive systems of fire insurance regulation.

The primary objective sought thereby is to require each assured to pay a premium measured by the *hazards of his risk* rather than a premium reflecting *competitive pressures* inherent in bargaining.

Generally speaking, State regulation[1] includes provisions for insurance departments (now existent in all States); laws and regulations relating to joint determination of reasonable and equitable rates; the adequacy of rates; commissions to agents and other acquisition costs; rebating; unfair discrimination; the filing of rates, plans, rules and regulations and other information and data for public inspection; the creation and maintenance of, or provision for, organizations or bureaus for promulgating uniform rates and the supervision of the issuance of policies in conformity with applicable rules and regulations; the qualifications necessary for the admission of fire insurance companies to do business; the qualifications of agents of fire insurance companies; the special taxation of fire insurance companies, domestic and foreign; the filing of special reports by fire insurance companies; standardized types of policies and forms of fire insurance coverage; dividends of participating insurers; and control of reserves and investments.

Licensing powers: Every State, without exception, requires a license as a prerequisite to engaging in the fire insurance business. Every State has requirements aimed at maintaining the solvency of fire insurance companies licensed by it. Every State reserves the right to revoke or refuse to renew any license granted by it.

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[1] See generally, The Spectator, "Fire Insurance Laws, Taxes and Fees, 1942-1943" (1942).

This power of granting or withholding annual licenses is the keystone of the Superintendent's power over foreign insurance companies. As Patterson[1] says:

> "With respect to administrative devices, the insurance commissioner has an armory of weapons which can scarcely be equalled. • • • His licensing power is his chief weapon" (pp. 7-8).

The breadth of this licensing power is well illustrated in *Aetna Casualty & Surety Co. et al.* v. *Sullivan*, 83 N. H. 426, 143 Atl. 687 (1928), holding that the statutory power to revoke was not limited to financial responsibility, but required the Commissioner to refuse to grant a license if "for other reasons he is satisfied it does not appear that the applicant is reliable and entitled to confidence" (83 N. H. 427-8).

Rating bureaus: The primary goal of State regulation has been uniformity of premium rates for fire insurance in order to spread scientifically the cost of insurance[2] in accordance with hazards and the law of averages.

Today the generally accepted medium of reaching that goal is the rating bureau. A rating bureau is an organization usually set up and maintained by fire insurance companies to establish for their members uniform fire insurance rates. It has a staff of trained experts to study hazards of risks and loss experiences of its members, establish schedules for classes of risks, and apply those

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[1] Patterson, *The Insurance Commissioner in the United States* (1927).

[2] The cost of insurance thus allocated by rating bureaus on a scientific basis has not—as implied by the misleading figures cited in the Government brief—resulted in unreasonable profits to the companies. (See *infra*, pp. 59-60.)

schedules to individual risks to arrive at a rate for each individual risk.[1]

The object of the rating bureau is well stated in *National Union Fire Ins. Co.* v. *Dickinson*, 128 Ark. 367, 194 S. W. 254 (1917):

> "It was shown that these Bureaus are created in most of the states of the Union, the purpose of such organizations being to place the business of fire insurance *on a scientific basis so that the premiums might be fixed according to the actual risks undertaken*, and by thus making rates commensurate with the true hazards the design was that the public should get the benefit of reduced rates growing out of a scientific and systematic conduct of the business" (194 S. W. 258).

In States which specifically provide by statute that insurance companies may or must be members of rating bureaus, the usual requirement is that the bureau rates must be filed with the State Insurance Commission. Generally it is further provided that the members must maintain the bureau rates unless they file advance notice of a deviation or variation from a bureau rate with the bureau and the Commission. This deviation must be uniform and applicable to all risks of essentially the same hazard in the class for which the variation is made. In some States, no deviation becomes effective until approved by the State Commission, and in some, the deviation must be made effective for not less than a year.

The necessity from the public viewpoint of maintaining adherence to *uniform* premium rates covering like hazards promulgated through rating bureaus is not only demon-

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[1] 1911 Report of Illinois Fire Insurance Commission to Legislature, p. 48.

strated by the legislation above mentioned, but is also recognized and enforced by the courts. Illustrative is the case of *Northwestern Nat. Ins. Co.* v. *Mortensen*, 230 Wis. 377, 284 N. W. 13 (Sup. Ct. Wis. 1939), wherein the courts of Wisconsin refused to enjoin, at the request of the plaintiff insurance company, the threatened revocation of its license for failure to comply with the fire insurance rate act—though all that the company had done was to charge a lower premium than that fixed for the hazard in question by the rating bureau of which it was a member.

Status of rating bureaus at present: Twenty-eight States today provide by statute for rating bureaus,[1] authorizing or requiring fire insurance companies to be members thereof. Only two States—Nebraska and Iowa—prohibit them. Of the seventeen States still having anti-compact laws on their

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[1] Arkansas, Pope's Dig. of Ark. Stat. (1937), Vol. 2, Sec. 7722; Colorado, Colo. Stat. Ann. (1935), Vol. 3, Ch. 87, Sec. 146; Idaho, Idaho Code Ann. (1932), Vol. 2, Sec. 40-1601; Illinois, Ill. Rev. Stat. (1943), Ch. 73, Sec. 1044; Indiana, Burn's Ind. Stat. Ann. (1933, 1940 Replacement), Vol. 8, Sec. 39-4310 (a); Kansas, Gen. Stat. of Kan. (1935), Sec. 40-922; Kentucky, Baldwin's Rev. Stat. of Ky. (1942), Sec. 298.240; Louisiana, Dart's La. Stat. Ann. (1939), Vol. 3, Sec. 4222; Michigan, Mich. Stat. Ann. (1937), Vol. 17, Sec. 24.52; Minnesota, Mason's Minn. Stat. (1927), Vol. 1, Sec. 3606; Mississippi, Miss. Code of 1930, Vol. 2, Sec. 5303; Missouri, Mo. Rev. Stat. Ann. (1939), Vol. 15, Sec. 5972; New Jersey, Rev. Stat. of N. J. (1937), Vol. 1, Sec. 17:29-6; New Mexico, N. M. Stat. Ann. (1941), Vol. 5, Sec. 60-610; New York, McKinney's Consol. Laws of N. Y. Ann. (1940), Vol. 27, Sec. 181; North Carolina, Michie's N. C. Code (1939), Sec. 6388; North Dakota, Ch. 152 of Laws of 1929, Sec. 1; Ohio, Page's Ohio Gen. Code, Vol. 6, Sec. 9592-1; Oregon, Ore. Comp. Laws Ann. (1940), Vol. 7, Sec. 101-1605(1); Pennsylvania, Purdon's Pa. Stat. (Perm. Ed.), Title 40, Sec. 692; South Carolina, S. C. Code (1942), Vol. 4, Sec. 8008; South Dakota, S. D. Code (1939), Vol. 1, Sec. 31.3701; Vermont, Public Laws of Vt. (1933), Sec. 7118; Virginia, Michie's Va. Code (1942), Sec. 4314(1); Washington, Remington's Revised Stat. of Wash. Ann. (1932, 1940 Supp.), Vol. 8, Sec. 7119; West Virginia, Michie's W. Va. Code (1943), Vol. 1, Sec. 3370; Wisconsin, Wis. Stat. (1939), Sec. 203.33; Wyoming, Wyo. Rev. Stat. (1931), Sec. 57-216(1).

books[1] eleven[2] have restricted such laws by permitting or requiring cooperative rate making through rating bureaus.

The statutes of twenty-nine[3] States provide either that premium rates must be filed with the State Insurance Department, or that the State Insurance Department may require such filing. The usual provision is that companies may not deviate from the filed rates unless a formal deviation is filed with or approved by the State Insurance Department.

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[1] See pp. 35-36, *supra*, of this brief.

[2] Arkansas, Pope's Dig. of Ark. Stat. (1937), Vol. 2, Sec. 7722; Kansas, Gen. Stat. of Kan. (1935), Sec. 40-922; Michigan, Mich. Stat. Ann. (1937), Vol. 17, Sec. 24.52; Louisiana, Dart's La. Stat. (1939), Vol. 3, Sec. 4222; Missouri, Mo. Rev. Stat. Ann. (1939), Vol. 15, Sec. 5972; Ohio, Page's Ohio Gen. Code, Vol. 6, Sec. 9592-1; Oregon, Ore. Comp. Laws. Ann. (1940), Vol. 7, Sec. 101-1605(1); South Carolina, S. C. Code (1942), Vol. 4, Sec. 8008; South Dakota, S. D. Code (1939), Vol. 1, Sec. 31.3701; Washington, Remington's Rev. Stat. of Wash. (1932, 1940 Supp.), Vol. 8, Sec. 7119; Wisconsin, Wis. Stats. (1939), Sec. 203.33.

[3] Arkansas, Pope's Dig. of Ark. Stat. (1937), Vol. 2, Secs. 7722, 7732; Colorado, Colo. Stat. Ann. (1935), Vol. 3, Ch. 87, Secs. 151, 154; Idaho, Idaho Code Ann. (1932), Vol. 2, Sec. 40-1608; Illinois, Ill. Rev. Stat. (1943), Ch. 73, Secs. 1041, 1049; Indiana, Burn's Ind. Stat. Ann. (1933, 1940 Replacement), Vol. 8, Secs. 39-4310(c), 39-4310(j); Kansas, Gen. Stat. of Kan. (1935), Sec. 40-911; Kentucky, Baldwin's Rev. Stat. of Ky. (1942), Secs. 298.260, 298.270(2); Louisiana, Dart's La. Stat. (1939), Vol. 3, Secs. 4222, 4239; Michigan, Mich. Stat. Ann. (1937), Vol. 17, Secs. 24.57, 24.60; Minnesota, Mason's Minn. Stat. (1927), Vol. 1, Secs. 3604, 3605; Mississippi, Miss. Code of 1930, Vol. 2, Secs. 5303, 5313; Missouri, Mo. Rev. Stat. Ann. (1939), Vol. 15, Sec. 5974; Nevada, Nev. Comp. Laws (Supp. 1931-41), Vol. 1, Sec. 3656.121; New Jersey, Rev. Stat. of N. J. (1937), Vol. 1, Sec. 17:29-6; New York, McKinney's Consol. Laws of N. Y. Ann. (1940), Vol. 27, Secs. 184(1), 184(6); North Carolina, Michie's N. C. Code (1939), Sec. 6390; Ohio, Page's Ohio Gen. Code, Vol. 6, Secs. 9592-6, 9592-9; Oklahoma, Okla. Stat. (1941), Title 36, Sec. 132; Oregon, Ore. Comp. Laws Ann. (1940), Vol. 7, Sec. 101-1605(8); Pennsylvania, Purdon's Pa. Stat. (Perm. Ed.), Title 40, Secs. 692, 695; South Carolina, S. C. Code (1942), Vol. 4, Secs. 8003, 8006; South Dakota, S. D. Code (1939), Vol. 1, Sec. 31.3701; Tennessee, Michie's Tenn. Code (1938), Sec. 6177; Vermont, Public Laws of Vt. (1933), Sec. 7118; Virginia, Michie's Va. Code (1942), Secs. 4314(8), 4314(4); Washington, Remington's Rev. Stat. of Wash. Ann. (1932, 1940 Supp.), Vol. 8, Sec. 7118;

Status of rating bureaus in States of indictment: Of the six States named in the indictment:

Virginia[1] requires all fire insurance companies to be members of a rating bureau organized pursuant to a Virginia statute. Bureau rates, deviations therefrom, schedules, rating methods, rules, agreements and regulations must be approved by the Virginia Insurance Department, which has the right to order reductions in rates. It also has the power to order any discrimination removed.

North Carolina[2] requires every rating bureau to file with the Insurance Department every schedule of rates and such other information concerning rates as may be requested, and also requires every rating bureau to furnish to any property owner full information as to the rate applicable to his property. The Insurance Department is empowered to ascertain and find whether any established rate is excessive or unfair.

South Carolina[3] permits every fire insurance company to maintain or be a member of a rating bureau which must admit to membership any licensed fire insurance company. The Insurance Department has the power to require every rating bureau to file with it information regarding its organization, maintenance and operation, as well as schedules, rates, forms, rules and regulations. The Insurance Commissioner is directed to examine a rating bureau at least once every three years, and has the power to order a reduction of rates.

West Virginia, Michie's W. Va. Code (1943), Vol. 1, Secs. 3372, 3377; Wisconsin, Wis. Stat. (1939), Secs. 203.42, 203.41; Wyoming, Wyo. Rev. Stat. (1931), Secs. 57-216(6), 57-216(9).

[1] Michie's Va. Code (1942), Secs. 4222 and 4314.

[2] Michie's N. C. Code (1939), Secs. 6388-94.

[3] S. C. Code (1942), Vol. 4, Secs. 8003-19.

Rating bureaus are permitted to operate in the States of Florida, Georgia and Alabama, although there are no specific statutes providing therefor. Alabama, in 1923, repealed a statute forbidding membership in a rating bureau.[1] The Supreme Court of Florida has upheld the operation of the Florida Rating Bureau (*Brock* v. *Hardie*, 114 Fla. 670, 154 So. 690 (1934)).

Anti-rebate and anti-discrimination statutes: As part of the general program to establish *uniformity* of fire insurance rates as contrasted with *fluctuating rates* due to competitive pressures, the States have enacted anti-rebate and anti-discrimination statutes.

At the present time forty-four States,[2] including Vir-

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[1] Ala. L. 1923, No. 359.

[2] Alabama, 1940 Code of Ala., Title 28, Sec. 75; Arizona, Ariz. Code Ann. (1939), Vol. 4, Sec. 61-331; California Ins. Code (1937), Sec. 750; Colorado, Colo. Stat. Ann. (1935), Vol. 3, Ch. 87, Sec. 70; Connecticut, Gen. Stat. of Conn. (1930), Sec. 4144; Delaware, Rev. Code of 1935, Ch. 20, Art. 2, Sec. 24; Florida, Fla. Stat. (1941), Sec 625.19; Georgia, Ga. Code (1933), Sec. 56-218; Idaho, Idaho Code Ann. (1932), Vol. 2, Sec. 40-1107; Illinois, Ill. Rev. Stat. (1943), Ch. 73, Sec. 763; Indiana, Burn's Ind. Stat. Ann. (1933, 1940 Replacement), Vol. 8, Sec. 39-5030; Iowa, Code of Iowa (1939), Sec. 8666; Kansas, Gen. Stat. of Kan. (1935), Sec. 40-917; Kentucky, Baldwin's Rev. Stat. of Ky. (1942), Sec. 298.230(1); Louisiana, Dart's La. Stat. (1939), Vol. 3, Sec. 4228; Maine, Rev. Stat. of Maine (1930), Ch. 60, Sec. 130; Maryland, Flack's Ann. Md. Code (1939), Vol. 2, Art. 48A, Sec. 45; Massachusetts, Michie's Ann. Laws of Mass., Vol. 5, Ch. 175, Sec. 182; Michigan, Mich. Stat. Ann. (1937), Vol. 17, Sec. 24.170; Minnesota, Mason's Minn. Stat. (1927), Vol. 1, Sec. 3766; Mississippi, Miss. Code of 1930, Vol. 2, Sec. 5319; Missouri, Mo. Rev. Stat. Ann. (1939), Vol. 15, Sec. 5979; Montana, Rev. Code of Mont. (1935), Vol. 3, Sec. 6121; Nebraska, Comp. Stat. of Neb. (1929), Sec 44-1105; Nevada, Nev. Comp. Laws (Supp. 1931-41), Vol. 1, Sec. 3656.45; New Hampshire, Rev. Laws of N. H. (1942), Vol. 2, Ch. 323, Sec. 38; New Jersey, Rev. Stat. of N. J. (1937), Vol. 1, Secs. 17:29-1, 17:29-2; New Mexico, N. M. Stat. Ann. (1941), Vol. 5, Sec. 60-704; New York, McKinney's Consol. Laws of N. Y. Ann. (1940), Vol. 27, Sec. 188; Ohio, Page's Ohio Gen. Code, Vol. 6, Sec. 9589-1; Oklahoma, Okla. Stat. (1941), Title 36, Sec. 149; Oregon, Ore. Comp. Laws Ann. (1940), Vol. 7, Sec. 101-143; Pennsylvania, Purdon's Pa. Stat. (Perm. Ed.), Title 40, Secs.

ginia, South Carolina, Georgia, Alabama and Florida, prohibit rebating any part of a fire insurance premium or giving an assured any advantage not specified in the policy.

Thus, one means of evading by indirection the general requirement of rate uniformity is checked.

Thirty-seven States,[1] including Virginia, North Carolina and South Carolina, have anti-discrimination statutes for-

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275, 471; Rhode Island, Gen. Laws of R. I. (1938), Ch. 157, Sec. 1; South Carolina, S. C. Code (1942), Vol. 4, Sec. 7994; South Dakota, S. D. Code (1939), Vol. 1, Sec. 31.1103(4); Tennessee, Michie's Tenn. Code (1938), Sec. 6133, Texas, Vernon's Texas Civ. Stat., Vol. 14, Sec. 4894; Utah, Utah Code Ann. (1943), Vol. 3, Sec. 43-3-32; Vermont, Public Laws of Vt. (1933), Sec. 7061; Virginia, Michie's Va. Code (1942), Sec. 4222c; Washington, Remington's Rev. Stat. of Wash. Ann. (1932), Vol. 8, Sec. 7077; West Virginia, Michie's W. Va. Code (1943), Vol. 1, Sec. 3299; Wisconsin, Wis. Stat. (1939), Sec. 201.53(2).

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[1] Arkansas, Pope's Digest of Ark. Stat. (1937), Vol. 2, Sec. 7728; Colorado, Colo. Stat. Ann. (1935), Vol. 3, Ch. 87, Sec. 153; Delaware, Rev. Code of 1935, Ch. 20, Art. 2, Sec. 24; Idaho, Idaho Code Ann. (1932), Vol. 2, Sec. 40-1605; Illinois, Ill. Rev. Stat. (1943), Ch. 73, Sec. 1042; Indiana, Burn's Ind. Stat. Ann. (1933, 1940 Replacement), Vol. 8, Sec. 39-4310(i); Iowa, Code of Iowa (1939), Sec. 8666; Kansas, Gen. Stat. of Kan. (1935), Sec. 40-917; Kentucky, Baldwin's Rev. Stat. of Ky. (1942); Sec. 298.270(1); Louisiana, Dart's La. Gen. Stat. (1939), Vol. 3, Sec. 4228; Maryland, Flack's Md. Ann. Code (1939), Vol. 2, Art. 48A, Sec. 45; Massachusetts, Michie's Ann. Laws of Mass., Vol. 5, Ch. 175, Sec. 104; Michigan, Mich. Stat. Ann. (1937), Vol. 17, Sec. 24.59; Minnesota, Mason's Minn. Stat. (1927), Vol. 1, Sec. 3605; Mississippi, Miss. Code of 1930, Vol. 2, Sec. 5310; Missouri, Mo. Rev. Stat. Ann. (1939), Vol. 15, Sec. 5977; Montana, Rev. Code of Mont. (1935), Vol. 3, Sec. 6121; Nebraska, Comp. Stat. of Neb. (1929), Sec. 44-1107; New Jersey, Rev. Stat. of N. J. (1937), Vol. 1, Sec. 17:29-6; New Mexico, N. M. Stat. Ann. (1941), Vol. 5, Sec. 60-704; New York, McKinney's Consol. Laws of N. Y. Ann. (1940), Vol. 27, Sec. 183(1)(c); North Carolina, Michie's N. C. Code (1939), Sec. 6391; North Dakota, Comp. Laws of N. D. (Supp. 1913-25), Ch. 18, Sec. 4922; Ohio, Page's Ohio Gen. Code, Vol. 6, Sec. 9592-8; Oklahoma, Okla. Stat. (1941), Title 36, Sec. 138; Oregon, Ore. Comp. Laws Ann. (1940), Vol. 7, Sec. 101-1605(5); Pennsylvania, Purdon's Pa. Stat. (Perm. Ed.), Title 40, Sec. 696; South Carolina, S. C. Code (1942), Vol. 4, Sec. 8005;

bidding the making of any rate which discriminates unfairly between risks in the application of like charges and credits or between risks of essentially the same hazard.

Similarly, this type of legislation, by imposing limitations on bargaining, serves to attain the goal of rate uniformity.

Compulsory increases in rates: Six States have also sought to remove the evils of competitive practices by giving specific power to their Insurance Commissioners to compel *increases* in rates if found to be *inadequate* and to refuse to approve deviations from rating bureau rates where the proposed rates are believed to be *inadequate.*[1] In two States,[2] the Commissioner is directed to revoke the license of any fire insurance company which precipitates or aids in conducting a rate war.

Uniform policies: In further promotion of the general program of curtailing competition, the States have established uniform fire insurance policies. Beginning in

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South Dakota, S. D. Code (1939), Vol. 1, Sec. 31.3702; Tennessee, Michie's Tenn. Code (1938), Sec. 6176; Utah, Utah Code Ann. (1943), Vol. 3, Sec. 43-3-33; Vermont, Pub. Laws of Vt. (1933), Sec. 7121; Virginia, Michie's Va. Code (1942), Sec. 4314(9); Washington, Remington's Rev. Stat. of Wash. Ann. (1932-1940 Supp.), Vol. 8, Sec. 7119a; West Virginia, Michie's W. Va. Code (1943), Vol. 1, Sec. 3377; Wisconsin, W's. Stat. (1939), Sec. 203.37(1); Wyoming, Wyo. Rev. Stat. (1931), Sec. 57-216(3).

[1] Indiana, Burn's Ind. Stat. Ann. (1933, 1940 Replacement), Vol. 8, Section 39-4310(i); Kansas, Gen. Stat. of Kans. (1935), Sec. 40-913; Michigan, Mich. Stat. Ann. (1937), Vol. 17, Sec. 24.51; New York, McKinney's Consol. Laws of N. Y. Ann. (1940), Vol. 27, Sec. 186(2); Oklahoma, Okla. Stat. (1941) Tit. 36, Sec. 134; Washington, Remington's Rev. Stats. of Wash. Ann. (1932, 1940 Supplement), Vol. 8, Sec. 7119a.

[2] Oregon, Ore. Comp. Laws Ann. (1940), Vol. 7, Sec. 101-1610; Washington, Remington's Rev. Stats. Wash. Ann. (1932), Vol. 8, Sec. 7157.

1873 in Massachusetts,[1] followed by Michigan in 1881[2] and New York in 1886,[3] the States; by statutes or regulations of insurance departments, have standardized fire policies and forms of coverage.

Today, thirty-one States,[4] including the States of Virginia, North Carolina and Georgia, prescribe standard forms of policies which must be used.

Unfair competition: The States have of course, by statute and common law, supplemented their general curtailment of fire insurance competition with specific condemnation of so-called "unfair competition". Boycott and dis-

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[1] Mass. L. 1873, Chap. 331, Secs. 1 and 2.

[2] Mich. L. 1881, No. 149.

[3] N. Y. L. 1886, Chap. 488.

[4] Arizona, Ariz. Code Ann. (1939), Vol. 4, Sec. 61-501; California, Calif. Ins. Code (1937), Sec. 2070; Connecticut, Gen. Stat. of Conn. (1930), Sec. 4159; Georgia, Ga. Code (1933), Sec. 56-810; Idaho, Idaho Code Ann. (1932), Vol. 2, Sec. 40-1401; Illinois, Ill. Rev. Stat. (1943), Ch. 73, Sec. 1009; Iowa, Code of Iowa (1939), Sec. 9017; Louisiana, Dart's La. Gen. Stat. (1939), Vol. 3, Sec. 4044; Maine, Rev. Stat. of Maine (1930), Ch. 60, Sec. 4; Massachusetts, Michie's Ann. Laws of Mass. (1933), Vol. 5, Ch. 175, Sec. 99; Michigan, Mich. Stat. Ann. (1937), Vol. 17, Sec. 24.422; Minnesota, Mason's Minn. Stat. (1927), Vol. 1, Sec. 3512; Nebraska, Neb. Comp. Stat. (1929), Sec. 44-601; Nevada, Nev. Comp. Laws (Supp., 1931-41), Vol. 1, Sec. 3656.117; New Hampshire, Rev. Laws of N. H. (1942), Vol. 2, Ch. 326, Secs. 1, 2; New Jersey, Rev. Stat. of N. J. (1937), Vol. 1, Sec. 17:36-3; New Mexico, N. M. Stat. Ann. (1941), Vol. 5, Sec. 60-608; New York, McKinney's Cons. Laws of N. Y. Ann. (1940), Vol. 27, Sec. 168; North Carolina, Michie's N. C. Code (1939), Sec. 6436; North Dakota, Comp. Laws of N. D. (1913), Ch. 79, Sec. 6625, as amended by Ch. 154, Laws of 1935; Oklahoma, Okla. Stat. (1941), Title 36, Sec. 243; Oregon, Ore. Comp. Laws Ann. (1940), Vol. 7, Sec. 101-1801; Pennsylvania, Purdon's Pa. Stat. (Perm. Ed.), Title 40, Sec. 657; Rhode Island, Gen. Laws of R. I. (1938), Ch. 154, Sec. 1; South Dakota, S. D. Code of 1939, Vol. 1, Sec. 31.2401; Texas, Vernon's Tex. Civ. Stat., Vol. 14, Sec. 4888; Virginia, Michie's Va. Code (1942), Sec. 4305a; Washington, Remington's Rev. Stat. of Wash. Ann. (1932), Vol. 8, Sec. 7152; West Virginia, Michie's W Va. Code (1943), Vol. 1, Sec. 3366; Wisconsin, Wis. Stat. (1939), Sec. 203.06; Wyoming, Wyo. Rev. Stat. Ann. (1931), Sec. 57-218.

paragement of other companies, not ancillary to lawful cooperative action, are prohibited—as is pointed out by the Government (pp. 131, 133).[1]

In short, the States have covered all phases of fire insurance alleged in the indictment herein—not only the cooperative determination of rates—but in addition all other acts alleged to be incident thereto which the Government has termed boycott and disparagement.

District of Columbia regulations: With its unlimited power to legislate for the District of Columbia, Congress has evidenced complete agreement with the States in their efforts to curtail competition, eliminate discrimination and establish premium uniformity.

In 1900, the House, in a bill for regulating fire insurance in the District of Columbia[2] adopted a clause prohibiting combinations fixing premium rates; the bill was never approved by the Senate.

In fact, in *Lown* v. *Underwriters' Association,* C. C. H. Fed. Trade Reg. Serv., Par. 6128 (Sup. Ct. D. C. 1915), the Supreme Court of the District held that the Sherman Act did not prohibit fire insurance companies from jointly fixing premium rates for the District.

Further, on April 22, 1943, Senator McCarren introduced a bill in the Senate[3] to provide for regulation of insurance rates in the District. Section 4 of the bill specifies that fire insurance companies authorized to do business in the District shall organize a rating bureau in which membership is mandatory. The rating bureau is to have the power to promulgate rates but no such rate shall be charged or en-

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[1] Cf. *Atlanta Association of Fire Insurance Agents* v. *McDonald,* 181 Ga. 105, 181 S. E. 22 (1935).

[2] H. R. 9283, 33 Cong. Rec. 3641, 3655; 33 Cong. Rec. 3667.

[3] Senate Bill 1029, 78th Cong., 1st Sess. 1943.

forced in the District by either the rating bureau or any member thereof until it shall have first been filed with and approved by the Superintendent. While companies may deviate from such rates, they must first file the deviation with the rating bureau and the Superintendent, and such deviation must be approved by the latter.

This bill was reported out favorably by the Senate Committee for the District of Columbia under date of November 12, 1943.

Congress also has enacted for the District anti-discriminatory and anti-rebate laws.[1]

European regulations: It may be of interest to note that in England one association of practically all companies for the making of fire insurance rates has existed since 1858, and the same situation generally prevails on the Continent.[2]

Effectiveness of regulation:[3] For the most part this State regulation described above has been signally effective in achieving the objectives of curtailing competition, without at the same time permitting the fire insurance companies to charge excessive rates.

Thus the average premium rate for the United States

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[1] D. C. Code 1940, Sec. 35-1333.

[2] Riegel, *Fire Underwriters Association in the United States* (1916), p. 69.

[3] To show the contrary, the Government (pp. 118-119) refers to a tabulation (89th Cong. Rec. Dec. 9, 1943) A 5777, admittedly prepared by an economist for the Department of Justice for use in the instant case, based upon figures taken from the confidential files of that Department without revelation as to the sources of information from which the tabulation was made. (Joint hearing before Subcommittees of the Committees on the Judiciary, 78th Cong., 1st Sess., on S. 1362, H. R. 3269 and H. R. 3270, pp. 142, 683, 684, 709 and 713.)

This tabulation merely covers the northeastern area of the United States (*Ibid.*, p. 712) and defendants strongly protest its use since, without disclosure of the source of the figures, it is in the nature of a self-serving declaration depriving the defendants of an opportunity to examine that source and controvert those figures.

dropped from $1.15 per $100, for the ten years 1900 to 1909, to $.61 in 1942, a reduction of nearly 50%.[1]

Furthermore the stock fire and marine insurance companies showed an average underwriting profit on their capital, subject to the risk of business, of only 2.9% for the years 1935 to 1939, inclusive.[2]

The States can and do control fire insurance profits. To illustrate—twenty six States provide statutory methods for the specific purpose of eliminating unreasonable rates.[3] Of these, twelve States by statute specifically authorize the Insurance Commissioner to order a reduction in rates if the companies have made an underwriting profit in excess of 5% or of a reasonable amount.[4]

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[1] The Weekly Underwriter "Record of Fire Insurance by States for 1942" (1943), p. 124.

[2] Joint hearings before Subcommittees of the Committees on the Judiciary, 78th Cong., 1st Sess., on S. 1362, H. R. 3269 and H. R. 3270, pp. 691-694.

[3] Illinois, Ill. Rev. Stat. (1943), Ch. 73, Sec. 1042; Massachusetts, Michie's Ann. Laws of Mass., Vol. 5, Ch. 175, Sec. 104; Michigan, Mich. Stat. Ann. (1937), Vol. 17, Sec. 24.51; Minnesota, Mason's Minn. Stat. (1927), Vol. 1, Sec. 3609; Nevada, Nev. Comp. Laws (Supp. 1931-41), Vol. 1, Sec. 3656.137; New Hampshire, Rev. Laws of N. H. (1942), Vol. 2, Ch. 321, Sec. 16; New Jersey, Rev. Stat. of N. J. (1937), Vol. 1, Sec. 17:29-8; New York, McKinney's Consol. Laws of N. Y. Ann. (1940), Vol. 27, Sec. 186(2); North Carolina, Michie's N. C. Code (1939), Sec. 6393; Oklahoma, Okla. Stat. (1941), Title 36, Sec. 134; Texas, Vernon's Tex. Civ. Stat., Vol. 14, Sec. 4878; Vermont, Pub. Laws of Vt. (1933), Sec. 7126; Washington, Remington's Rev. Stat. of Wash. Ann. (1932-1940 Supp.), Vol. 8, Sec. 7119c; Wisconsin, Wis. Stat. (1939), Sec. 203.38; plus the statutes listed in footnote 4 below.

[4] Arkansas, Pope's Dig. of Ark. Stat. (1937), Vol. 2, Sec. 7730; Colorado, Colo. Stat. Ann. (1935), Vol. 3, Ch. 87, Sec. 157; Indiana, Burn's Ind. Stat. Ann. (1933, 1940 Replacement), Vol. 8, Sec. 39-4310(1); Kansas, Gen. Stat. of Kan. (1935), Sec. 40-913; Kentucky, Baldwin's Rev. Stat. of Ky. (1942), Sec. 298.290; Louisiana, Dart's La. Stat. (1939), Vol. 3, Sec. 4230; Mississippi, Miss. Code of 1930, Vol. 2, Sec. 5311; Missouri, Mo. Rev. Stat. Ann. (1939), Vol. 15, Sec. 5984; South Carolina, S. C. Code (1942), Vol. 4, Sec. 8016; Virginia, Michie's Va. Code (1942), Sec. 4314(9); West Virginia, Michie's W. Va. Code (1943), Vol. 1, Sec. 3379(d); Wyoming, Wyo. Rev. Stat. (1931), Sec. 57-217.

Theory behind State curtailment of competition.

Fundamentally of course the rationale of this State curtailment of competition has been that insurance has been found to differ sharply from other business.

The public interest in forbidding restraints on free competition was based upon the conception of buyers competing among themselves on one side and sellers on the other, so that free play could be given to the law of supply and demand. It involved the idea of a market in which prices can best be determined by unrestrained competition and are not primarily dependent upon a factor which is beyond the control of competition. This view ignored any interest in the seller on the part of the public or of the buyers after the marketing transaction had taken place. It was accepted as a necessary consequence that marginal sellers would be eliminated through bankruptcy.

The States found the public interest in insurance, however, to be vastly different. Fire insurance is in essence a means by which the risk of loss by fire is distributed according to the hazards, as determined by experience and the law of averages. The public interest accordingly lies in causing each assured to contribute according to the hazard to which his property is subject, determined to the extent possible with scientific accuracy rather than by the process of bargaining between the insurer and the assured. Since any deficiency in the contribution of one assured must be made good by that of others, mere competitive bargaining between insurer and one assured, which gives that assured a rate lower than that called for by the hazards involved, has the result of increasing the rates applicable to others and violating the principles on which the structure of fire insurance is based.

The States, moreover, found insurance to require different treatment in that the public had an interest in the sol-

vency of the insurers. If a premium rate is too low it endangers the protection of all assureds. An assured does not end his relationship with the insurer upon the issuance of a policy. He has a continuing interest in the solvency and well-being of the insurer, as he pays *now* for performance in the *future*—and he cannot obtain performance from an insolvent. Accordingly, the States came to favor reinsurance and other agreements between the fire insurance companies, providing for the sharing of risks at fixed rates.

The essential difference between fire insurance and commercial transactions of the market place, as discovered by the States, was pointed out by Mr. Justice McKenna in *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389, as follows:

> "We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby and charged with great responsibility. *How necessary their solvency is, is manifest.* • • • It is therefore, essentially different from ordinary commercial transactions • • •" (pp. 414-5).

The Government indeed expressly concedes in its brief that:

> "• • • we agree that a first requisite in the insurance business is the soundness of the companies.

> And it may be that completely unrestricted competition among insurance companies, as among railroads, would be harmful to the public" (p. 119).

Judicial approval of State curtailment of competition.

Beyond question this comprehensive State regulation, which encourages *cooperation* rather than *competition* in fire insurance, is diametrically opposed to the Sherman Act. To illustrate, with respect to premiums—

> (1) The States permit or require cooperation in rate determination. The Sherman Act, however, forbids this. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150.
>
> (2) The States permit or require adherence to published rates. The Sherman Act, however, frowns on this. *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553.
>
> (3) The States permit or require action discouraging rate cutting. The Sherman Act, however, condemns this. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373.

As observed in the Merritt Committee Report, in contrasting State regulation with anti-compact laws dealing with fire insurance:

> "It is interesting to observe, however, how entirely the principle of State regulation is opposed to the principle of anti-compact. Under anti-compact, a premeditated and enforced uniformity of rates was prohibited while under State regulation the effect, either by statute or in actual practice, is to secure absolute uniformity. The anti-compact laws in effect made it possible to 'bargain' and the result was gross discrimination; under State regulation bargaining and discrimination are impossible" (p. 51).

This comprehensive State regulation, while opposed to the Sherman Act, nevertheless has been repeatedly upheld by this Court. The following cases are illustrative of the numerous holdings approving State curtailment of competition in fire insurance:

(1) *German Alliance Insurance Company* v. *Kansas*, 233 U. S. 389, upholds the right of the State to regulate insurance rates.

(2) *O'Gorman and Young, Incorporated* v. *Hartford Fire Insurance Company*, 282 U. S. 251, upholds the right of the State to regulate agents' commissions.

(3) *Osborn et al.* v. *Ozlin et al.*, 310 U. S. 53, upholds State legislation of Virginia requiring insurance policies with respect to property within that State to be executed through resident agents, and fixing the commissions payable to those agents.

(4) *Hoopeston Canning Co. et al.* v. *Cullen*, 318 U. S. 313, holds that fire insurance is of such peculiarly local character that a State can regulate a reciprocal fire insurance association even though its contracts are entered into outside the State if they relate to property within its borders.

In thus upholding State curtailment of competition in fire insurance, this Court frankly acknowledges that free competition—the purpose of the Sherman Act—may be and has been dispensed with legally by the several States.

This is emphasized by Mr. Justice Frankfurter in *Osborn et al.* v. *Ozlin et al.*, 310 U. S. 53:

> "Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissitudes of life *have long been withdrawn from the benefits and caprices of free competition.* The state may fix insurance rates, *German Alliance Ins. Co.*

> v. *Lewis*, 233 U. S. 389; it may regulate the compensation of agents, *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251; it may curtail drastically the area of free contract, *National Ins. Co.* v. *Wanberg*, 260 U. S. 71" (pp. 65-66).

Threatened nullification of State regulation.

If insurance is held to be "commerce" within the meaning of the Sherman Act, this State curtailment of competition calculated to encourage and establish uniform rates necessarily would fall because of its essential inconsistency with that Federal statute.

The Government has conceded (p. 126) the application to such State regulation of the principle recently enunciated by this Court in *Cloverleaf Co.* v. *Patterson*, 315 U. S. 148, as follows:

> "• • • where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application" (p. 156).

The principal case cited by the Government on State regulation, namely *Parker* v. *Brown*, 317 U. S. 341, itself declares that such regulation—if inconsistent with the Sherman Act and applicable to interstate commerce—is rendered nugatory by that Act:

> "• • • a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful" (p. 351).

Thus, in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183, for example, State approved price agreements were declared:

> "• • • so far as interstate commerce was affected, invalid under the Sherman Anti-Trust Act" (p. 188).

If fire insurance is held to be interstate "commerce" within the meaning of the Sherman Act certainly the basic objectives of State regulation, namely, the power to control insurance companies through licensing, inspection and requirements for reserves and the power to compel or encourage uniformity in premium rates, will cease.

That the States' ability to exercise detailed control of insurance companies will terminate, upon such an event, is shown among other decisions by the following:

Crutcher v. *Kentucky*, 141 U. S. 47;
International Textbook Company v. *Pigg*, 217 U. S. 91;
Adams Express Co. v. *New York*, 232 U. S. 14;
Furst and Thomas v. *Brewster et al.*, 282 U. S. 493;
Bingaman v. *Golden Eagle Western Lines, Inc.*, 297 U. S. 626.

State regulation, it should be clearly understood, is no half-hearted or piecemeal control of fire insurance. All phases—rates, commissions, cooperation, discrimination, rules, policies, taxation, reports, reserves, investments, and dividends—are covered in detail in one comprehensive program.

If fire insurance is interstate commerce, as asserted by the Government, this comprehensive and drastic regulation of all phases of that commerce cannot stand. Isolated provisions may escape destruction; but any State program to regulate interstate commerce broadly must fall.

Baldwin v. *G. A. F. Seelig*, 294 U. S. 511;
Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282;
Lemke v. *Farmers Grain Co.*, 258 U. S. 50;
Shafer v. *Farmers Grain Co.*, 268 U. S. 189.

This Court in *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, cited by the Government in its brief, emphasized that State regulation of any comprehensive nature must be restricted to local matters:

> "• • • remotely affecting and wholly unrelated to interstate commerce" (p. 353).

That State fire insurance regulation must fall if such insurance is commerce was clearly recognized in the leading case of *New York Life Insurance Company* v. *Deer Lodge County*, 231 U. S. 495, as follows:

> "To reverse the cases, • • • would require us to promulgate a new rule of constitutional inhibition upon the States and which would compel a change of their policy and a readjustment of their laws" (p. 502).
>
> "• • • If insurance is commerce and becomes interstate commerce whenever it is between citizens of different States, *then all control over it is taken from the States and the legislative regulations which this court has heretofore sustained must be declared invalid*" (p. 509).

Louisiana, speaking through its Insurance Commission on October 7, 1943,[1] with reference to the decision herein of the lower court, accurately summarized the effect on State regulation as follows:

> "Unquestionably, a reversal of the district court decision in those cases by the United States Supreme Court would, in effect, nullify all State legislation providing for the establishment and maintenance of

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[1] Letter of Louisiana Insurance Commission to Senator Van Nuys, Joint Hearing before the Subcommittees of the Committees on the Judiciary, 78th Cong., 1st Sess., on S. 1362 and H. R. 3269, 3270, p. 240.

uniform rates and coverages under local control and supervision. And such result, it is submitted, is not desired, either by the public, or the insurance companies or State officials, all of whom are decidedly well satisfied with the very favorable results produced by State regulation and are, in addition, unalterably opposed to further encroachment by the Federal Government on States' rights, which the permitted extension of the antitrust laws in this case would constitute."

To sustain the instant indictment and thus invalidate State curtailment of competition would destroy, by a single stroke, the result of years of State experience demonstrating that stability rather than competition in rate making best serves the public interest.

Authorities cited by Government.

The discussion of the Government on State regulation adds little.

What laws nullified: The Government primarily urges that—while the Sherman Act will nullify inconsistent State regulation, if fire insurance is held to be commerce under the Sherman Act—nevertheless some of the State regulation will be saved.

The grave doubts which the Government expresses on this matter, however, demonstrate the weakness of this Government contention.

(a) The Government generally claims in most guarded language that "We think it not improbable" that the rating bureaus, minus certain functions, "might" still operate (p. 120), that this Court will have to pass on the State regulation "in accordance with" the "relevant facts and circumstances" (p. 125), and that "to the

extent" the insurance cases recognize the need for local regulation they "may" still be given effect (pp. 125-6).

(b) The Government then specifically admits that the Sherman Act "would" apply to set aside regulations of five States (p. 130), asserts that whether the Act would apply to eleven more "might" depend upon how the rates were established (pp. 130-131) and finally can only suggest that regulations of five other States "might" well be upheld (p. 130).

Effect of nullification: The Government next discusses what the effect would be if State regulation were nullified by the Sherman Act. In this discussion, however, the Government takes diametrically opposing positions.

On the *one* hand the Government argues that the nullification of State regulation would do no harm, because the rating bureaus and attendant cooperative action are harmful to the public.

It cites Insurance Commissioners Pink of New York and De Celles of Massachusetts, and certain other writers, as critical of these bureaus (pp. 113-114).

Further reading of these writers, however, reveals that they are very much in favor of the continued operation of such bureaus.

Pink, *The Problem of Fire Rates* (1942), cited by the Government, for example states:

> "It is strange that after we have made so much progress over so many years with the difficult art of rating that there should be anyone to question the advisability of rating organizations in the fire field. It would seem that the effort should be, not to destroy the company rating organizations, but to make rating more efficient and more responsive to changing conditions. There can be no intelligent or systematic

> fixing of premiums unless there are rating organizations which collect adequate statistics and use the experience in proposing fire rates for the industry" (p. 2).

De Celles, *The Legal Aspects of Insurance Cost and Coverage* (1936), cited by the Government, similarly states:

> "Please do not misunderstand my position. I am not against the rating bureau. The bureau is the most efficient method of making rates. It combines into one group the various ideas of hundreds of companies" (p. 13).

On the *other* hand the Government argues that the nullification of State regulation would do no harm, because the rating bureaus and attendant cooperative action could continue with the Department's blessing.

The Government concedes that the first requisite in fire insurance is the solvency of the companies (p. 119). It then offers a Departmental-approved modification of the Sherman Act to permit "a large area in which insurance companies may cooperate" and assures the defendants that the Government will not "take issue" with them if they act within that area (pp. 109-110, 119, *et seq.*).

This suggestion that the Department can authorize these practices if the Sherman Act is applicable, however, is without merit.

It is perfectly apparent that the basic principle of the Sherman Act is diametrically opposed to the principles on which State regulation is based. The Sherman Act is intended to require free and unrestricted competition. In enforcing that Act it has been the principle of the Government authorities that price warfare is to be encouraged; that anything which results in stabilization is taboo; that under ordinary conditions, prices should follow a con-

tinuous downward spiral of underbidding; that bankruptcy is the normal and inevitable concomitant of competition required under the Sherman Act.

It has been the policy of the Government under the Sherman Act that anything which pegs, stabilizes, puts a bottom under, or otherwise tampers with the price structure is illegal *per se* under the literal enforcement of the doctrine of the *Madison Oil* case, 310 U. S. 150.

Under these circumstances it is not to be wondered that the defendants are very skeptical indeed of any suggestion that the Department would regard with acquiescence and complacency the continued operation of rating bureaus which might not only compute statistics as to the proper ratio of burning losses, but might even "evaluate" risks containing necessarily elements of judgment. The defendants have good reason to fear that if rating bureaus should prepare such tables and evaluations —and if they were intended to be used and were actually used in any substantial and effective manner, either to determine the proper differentials between different classes of risks or as bottoms below which rates should never go— the Department of Justice and the Federal Trade Commission would treat such action exactly as they have treated other association activities. What assurance could the defendants have that the Government agencies would not immediately move in with the usual charges of—

"Gary dinners"—
"stabilization"—
"tacit understanding"—
"concert of action"—
"price leadership"—
"bodies organized to receive such intimations and act thereon"—
"purpose and effect of limiting competition"—

and other expressions which are the familiar language of trade association cases.

Moreover, there is no merit in the suggestion that tables evaluating burning risk upon an actuarial basis (which is only one factor of fire insurance cost) would of themselves be sufficient—even if generally used—to protect the companies from insolvency. If insolvency is to be avoided, the companies must recover not merely this one factor of their cost but their entire cost, including the cost of doing business and the cost of building up reserves against general conflagrations which lie outside the normal burning loss.

Is there any doubt that the Government would regard agreements not to sell below cost—or any part of cost—as a violation of the Sherman Act? To repeat, the Sherman Act regards bankruptcy as normal.

The States have built up a comprehensive system of legislation based upon exactly the opposite principle—namely, that solvency is the first requisite of any intelligent regulation of insurance—and that unrestricted rate competition is incompatible with solvency.

The application of the Sherman Act would not merely affect that system in minor and unimportant ways. It would cut the very heart out of it.

The State system of regulation herein involved would not be saved by the application of the doctrine of *Parker* v. *Brown*, 317 U. S. 341. That case involved State regulation in conformity with Federal agricultural legislation which expressly contemplated State cooperation in its enforcement. The reliance the Court placed on the harmony in objectives of the State and Federal regulation shows this case to have no value as a precedent where the antithetical objectives of unlimited Federal competition and minute State regulation are involved.

Relevancy of nullification: The Government finally urges that the nullification of State regulation is beside the point here, since the State regulation allegedly does not justify certain of the alleged acts charged against the defendants, namely acts of boycott and disparagement (pp. 132-133).

If the Sherman Act is applied to fire insurance by reason of the alleged boycott and disparagement, however, the Act is applied generally to fire insurance. The Act does not stop with forbidding an alleged boycott—it also forbids cooperative rate determination.

In other words, to apply the Sherman Act to fire insurance in order to reach an alleged boycott means simultaneously to apply the Act to the destruction of State curtailment of competition.

If, in fact, the defendants are guilty of an illegal boycott, the laws of the several States afford adequate means for the punishment of such conduct—as the Government itself points out (pp. 131, 133)—without destruction of an entire regulatory structure based on years of experience.

IV.

This Court Will Unsettle the Law Applicable to Fire Insurance and Expose Defendants To Retroactive Criminal Penalties if it Now Holds That Fire Insurance Is Commerce.

Government argument.

The Government, in requesting this Court to hold that fire insurance is "commerce" within the meaning of the Sherman Act, considers the chaotic effect of such a holding upon the States, the companies and their assureds to be of little or no importance.

It finds no injustice whatever in a demand that this Court sustain the indictment herein by reversing its holdings of 75 years and thus expose all insurers to criminal punishment for uniformity of action permitted or required by State regulation previously upheld by this Court.

Chaotic business conditions.

That the States and the insurance companies will be faced with tremendous problems if the Sherman Act applies to fire insurance, is all too clear. Primarily these problems will arise out of the necessity of determining to what extent the Sherman Act and to what extent State statutes control. Obviously, the companies cannot serve two totally inconsistent masters. They cannot participate in establishing uniform premium rates as required or permitted by the States and still obey the demands of the Sherman Act which would prohibit such cooperative action.

If the indictment is sustained, therefore, chaotic uncertainty inevitably will exist for many years. It will only be after a period of protracted litigation that anyone can tell what, if any, part of State regulation remains valid and enforceable.

That such uncertainty will exist is in effect admitted by the Government in its brief (p. 130). There the Government says "a rate so approved *might well* become the [lawful] act of the state government"; "Whether rates fixed in the latter group would be lawful *might* depend upon how they were established"—and the like.

This uncertainty on the part of the Government illustrates the tremendous uncertainty that will necessarily follow application of the Sherman Act.

If a State, as the result of its experience, chooses to make membership in a bureau mandatory, the companies obeying might or might not be guilty of violating the Sher-

man Act according to the Government. If, on the other hand, the State chooses to give to the companies the option of belonging or not belonging to a rating bureau, the Government thinks that those belonging would clearly violate the Sherman Act.

Hence, to maintain any regulation, the States would have to enter upon a trial and error method, bringing each type of regulation to this Court for ultimate adjudication.

In short, the insurance companies would have no safety zone in which their activities would be clearly legal. If they conducted their business in a manner clearly lawful under the Sherman Act, they would be faced with revocation of their licenses to do business in many States. If they attempted compliance with the State laws, they would face the criminal penalties of the Sherman Act.

New Jersey, speaking through its Insurance Commissioner,[1] has frankly stated that:

> "If the Court should now decide that insurance is commerce or interstate trade an extremely serious situation would at once arise as the business would then be subject to the Sherman and Clayton Acts with which many of the regulatory laws of the several States, including New Jersey, are in direct conflict. This would create a most deplorable situation, causing a serious disruption in the orderly conduct of this business which is of such vital public interest."

Vermont, speaking through its Commissioner of Banking and Insurance,[2] has similarly pointed out:

> "* * * the chaotic condition that will exist should insurance be deemed subject to the Federal anti-trust laws."

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[1] Letter dated October 6, 1943, Joint Hearing before the Subcommittees of the Committees on the Judiciary, 78th Cong., 1st Sess., on S. 1362 and H. R. 3269, 3270, p. 246.

[2] *Supra*, Note 1, p. 252.

Wisconsin, also speaking through its Commissioner of Insurance,[1] has expressed the same views:

> "To my mind, it would be anomalous in the extreme if insurance companies were compelled to follow the mandate of State statutes, which call for membership in rating bureaus and combined action in the promulgation of forms and other necessary adjuncts of the business of underwriting, and yet be subject to the charge of combining and confederating under Federal antitrust laws by reason of their group observations of State statutes.
>
> "Nothing short of chaos would result in the business were such a condition to obtain."

This confusion will be the more confounded by reason of the necessity for reinsurance and other agreements among fire insurance companies, providing for the sharing of large risks at fixed rates.

Automatic reinsurance, the predominant form today,[2] is a contract by which the reinsurer agrees to assume a fixed portion of the liability the instant the original insurer issues a policy. In return, the reinsurer receives a portion of the premium paid by the assured. Thereby each insurer can issue with safety a policy in any sum or a number of policies covering risks of loss in conflagration centers since its maximum liability thus is limited to predetermined amounts.

This automatic reinsurance, however—so necessary to the financial safety of insurers and so essential to adequate insurance coverage on larger risks—can only exist where the reinsurer knows in advance the premium rate to be received. It will not agree to bear a portion of a risk sight

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[1] Letter dated September 30, 1943, Joint Hearing before the Subcommittees of the Committees on the Judiciary, 78th Cong., 1st Sess., on S. 1362 and H. R. 3269, 3270, p. 253.

[2] Golding, The Law and Practice (1937), pp. 41-42.

unseen unless it knows beforehand that the premium rate will afford adequate return for the risk undertaken. This principle of a premium rate agreed upon in advance is the very essence of automatic reinsurance.

If the Sherman Act were held to apply to fire insurance, in place of State regulation, the validity of these agreements—not only as to future contracts—but as to the very large number of contracts now outstanding—would be threatened and fire insurance itself endangered. All such existing agreements might at once become illegal and void.

The doctrine stated by this Court in *National Bank* v. *Whitney*, 103 U. S. 99, in refusing to change an established rule of law because of its effect on the welfare of the community, seems clearly applicable:

> "* * * *The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed.* If there should be a change, the legislature can make it with infinitely less derangement of those interests than would follow a new ruling of the court, for statutory regulations would operate only in the future" (p. 102).

***Ex post facto* penalties.**

Chaotic uncertainty, however, will not be the only effect of holding fire insurance to be commerce within the meaning of the Sherman Act. Retroactive criminal penalties are also involved. To explain—

The fire insurance companies did not ask for State regulation. They fought it strenuously, seeking federal regulation as a substitute. However, Congress consistently refused to act.

This Court, moreover, holding that fire insurance is not commerce but is subject to State regulation, compelled the

fire insurance companies to conform their business activities to such State statutes.

If now the Sherman Act be applied to fire insurance, as sought by the instant indictment, fire insurance companies will be condemned for a uniformity of action expressly sought by the State regulation which this Court compelled them to obey. They will be subjected to penalties, under what might well be termed an *ex post facto* theory of law, for activities which until now were held to be legal.

That such *ex post facto* punishment has never been favored by the courts was stated as early as 1793 by Lord Kenyon, in *Rex* v. *Younger*, 5 T. R. 449, 101 Eng. Reprint 253, as follows:

> "Thirty-four years have nearly passed since the decision of the case of R. *v.* Cox, which informed the public that all bakers have a right to do what is imputed to this defendant as an offence. This circumstance alone ought to have some weight in the determination of this case. It would be cruel not only to the defendant, but also to those in a similar situation with him, if we were now to punish him for doing that which this court publicly declared so many years ago might be done with impunity, and which so many persons have been doing weekly for such a number of years" (p. 450).

Indeed in view of uniform precedent that fire insurance is not commerce—concurred in both by Congress and the Department of Justice—an interpretation of the Sherman Act now as applicable to fire insurance might well render the language of the Act so vague and uncertain as to be repugnant to the Fifth and Sixth Amendments to the Constitution. That Act would indeed be vague if for over fifty years "commerce" did not include fire insurance but suddenly in January, 1944, it does include such insurance.

This Court has repeatedly held, however, that the Sherman Act is not vague and uncertain—thereby ruling against any such sudden change in the Act's meaning.

No reversal under these conditions.

When faced with consequences far less serious, this Court has refused repeatedly to reverse its established doctrines. Indeed, Mr. Justice McKenna, in *New York Life Insurance Company* v. *Deer Lodge County,* 231 U. S. 495, 502, reaffirming *Paul* v. *Virginia,* applied the rule expressly to insurance—as we have previously shown.

In one of the most recent decisions by this Court, *Helvering* v. *Griffiths,* 318 U. S. 371, the Government asked that *Eisner* v. *Macomber,* 252 U. S. 189, which had held common stock dividends not taxable as income, be reviewed and overruled. The Supreme Court flatly refused, enunciating through Mr. Justice Jackson the following applicable principles:

> "We are asked to make a retroactive holding that for some seven years past a multitude of transactions have been taxable although there was no source of law from which the most cautious taxpayer could have learned of the liability. If he consulted the decisions of this Court, he learned that no such tax could be imposed; if he read the Delphic language of the Act in connection with existing decisions, it, too, assured him there was no intent to tax; if he followed the Congressional proceedings and debates, his understanding of nontaxability would be confirmed; if he asked the tax collector himself, he was bound by the Regulations of the Treasury to advise that no such liability existed. It would be a pity if taxpayers could not rely on this concurrent assurance from all three branches of the Government" (p. 402).

Similarly, it would be a pity indeed if the fire insurance companies could not rely on like assurance from the same three branches of Government. In fact, their hardship will be even greater if this Court now reverses itself and sustains the instant indictment. They will be exposed to *criminal* punishment for acts which such assurances have led them to believe were legal.

V.

The Power Of Congress To Regulate Fire Insurance Is Not Here At Issue.

Government argument.

Finally the Government argues in its brief that even if fire insurance is not "commerce", nevertheless Congress has power to regulate it under its "commerce power", and that the Sherman Act constitutes an exercise of this power.

The Government states sweepingly that "We have sought to show that • • • the [fire insurance] business • • • is both commerce and interstate commerce. Even if this were not so, however, regulation of the business under the commerce clause would be lawful because of the close economic relation between fire insurance and activities which are unquestionably interstate" (pp. 60-61). According to the Government, "The insurance industry should be subject to federal regulatory power" (p. 67).

The Government further argues that "The words 'trade or commerce', as used in the Sherman Act, were not intended to have a narrower meaning than in the Constitution" (p. 71), that the "Act and Constitution have the same scope" (p. 72), and that it is not unreasonable "to subject the fire insurance industry to the anti-trust laws" (p. 108).

Argument totally irrelevant.

This argument by the Government is not directed to any issues raised by the defendants' challenge of the instant indictment.

It is more a request for an advisory opinion, on strictly theoretical questions, than a defense of the instant indictment. There is, therefore, no need here to do more than point to the irrelevancy of this argument.

Scope of commerce clause not at issue.

The Government is raising a straw issue when it argues that the commerce clause of the Constitution *can* extend to a non-commerce activity such as fire insurance.

The scope of the commerce clause is not at issue here. The Sherman Act alone is involved and its scope is considerably more limited.

A demonstration that Congress *can* regulate fire insurance is not any demonstration that Congress *has* regulated it by the Sherman Act—for Congress through the Sherman Act has not exercised its full power over non-commerce activity.

This is strikingly illustrated by *Apex Hosiery Co.* v. *Leader et al.*, 310 U. S. 469, wherein this Court, through Mr. Justice (now Chief Justice) Stone, held that certain intrastate activity which admittedly "affected" commerce—namely, a sit-down strike causing a cessation of interstate activity—was subject to the commerce clause but was not within the purview of the Sherman Act. These activities held *not* to come within the Sherman Act were described as follows:

> "Here the strikers' activities were as closely related to interstate commerce and *affected* it as substantially as numerous other activities not in themselves interstate commerce *which have nevertheless been held to be subject to federal statutes enacted in the*

> *exercise of the commerce power.* More recently, where the statute was by its terms applicable and the question was of Congressional power, we have sustained the application of the Wagner Act, 49 Stat. 449, 29 U. S. C. §§151-166, regulating labor relations 'affecting' interstate commerce to situations no more closely related to the commerce than these, and where the interstate commerce affected was no greater in volume" (pp. 484-485).

This difference between the scope of Congressional power and its exercise thereof by the Sherman Act (the latter alone being involved here) is further supported by *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, wherein this Court pointedly noted that Congress, in limiting the coverage of the Sherman Act to interstate commerce, while expanding the scope of the National Labor Relations Act to activities "affecting" interstate commerce,[1] thereby had restricted the Sherman Act to a more limited scope:

> "* * * while a phase of industrial enterprise may be subject to control under the National Labor Relations Act, a different phase of the same enterprise may not come within the 'commerce' protected by the Sherman Law" (p. 521).

The scope of the commerce power and of an act exercising that power are similar, in reaching local non-commerce activity merely "affecting" interstate commerce,

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[1] The expanded coverage of the National Labor Relations Act clearly distinguishes *Polish National Alliance* v. *National Labor Relations Board*, 136 F. (2d) 175 (C. C. A. 7th, 1943), now before this Court. That case did not involve the Sherman Act and only by way of dictum did the court state that insurance was "commerce" within the power of Congress to regulate. The court conceded that its holding was not premised upon any ruling that insurance is or is not "commerce":

> *"The fact, if such it be, that insurance is not commerce* or that petitioner is a non-profit organization *no longer requires a contrary conclusion"* (p. 180).

only when Congress expressly so directs. The Sherman Act is barren of any such direction.

As is emphasized in *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349 (1941), in connection with the Federal Trade Commission Act which likewise uses the word "commerce":

> "When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly. See for example, National Labor Relations Act, §§2(7), 9(c), 10(a), 49 Stat. 450, 453, 29 U. S. C., §§152(7), 159(c), 160(a); Bituminous Coal Act, §4-A, 50 Stat. 83, 15 U. S. C., §834; Federal Employers' Liability Act, §1, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U. S. C., §51" (p. 351).

The irrelevance of the Government's straw issue herein, in confusing Congress' *power* to legislate with its limited exercise in the Sherman Act, is well epitomized in the last cited case:

> "This case presents the narrow question of what Congress *did*, not what it *could do*" (p. 355).

Scope of Sherman Act not at issue.

The Government raises another strictly theoretical or straw issue when it claims that the Sherman Act—whether or not exhausting the commerce power—*can* extend to fire insurance on the theory that although it is not itself commerce fire insurance burdens other commerce.

A demonstration that the Sherman Act can apply to fire insurance on some theory that it burdens *other* commerce is irrevelant in this case, because the court below has squarely held that the indictment charges—not a restraint of *other* commerce—but solely a restraint of *commerce in fire insurance* alone (see *supra*, pp. 2-4 of this brief).

We are of course controlled here by this construction. To refer to illustrative cases:

In *United States* v. *Borden Company et al.*, 308 U. S. 188 (1939), previously cited, it was ruled:

> "This Court must accept the construction given to the indictment by the District Court as that is a matter we are not authorized to review" (p. 193).

In *United States* v. *Colgate & Company*, 250 U. S. 300 (1919), this Court went to considerable length to discover the lower court's interpretation of the indictment, but refused to examine the indictment itself, saying:

> "Our problem is to ascertain, as accurately as may be, what interpretation the trial court placed upon the indictment—not to interpret it ourselves; and then to determine whether, so construed, it fairly charges violation of the Sherman Act" (p. 306).

In *United States* v. *Yuginovich et al.*, 256 U. S. 450 (1921), this Court similarly ruled:

> "It is well settled that in cases of this character the construction or sufficiency of the indictment is not brought before us. *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Stevenson*, 215 U. S. 190. For the purpose of interpreting the statute we adopt the meaning placed upon the indictment by the court below. *United States* v. *Colgate Co.*, 250 U. S. 300" (p. 461).

In *United States* v. *Winslow*, 227 U. S. 202, Mr. Justice Holmes, delivering the opinion of this Court affirming the action of the district court in sustaining a demurrer to the indictment, stressed the same rule:

> "The District Court construed the indictment as confined to the combination of February 7, that is,

> simply to the merger of the companies without regard to the leases subsequently made, 195 Fed. Rep. 592, 594; and we have no jurisdiction to review this interpretation of the indictment. *United States* v. *Patten*, 226 U. S. 525. Hence the only question before us is whether that combination taken by itself was within the penalties of the Sherman Act. The validity of the leases or of a combination contemplating them cannot be passed upon in this case" (pp. 216-217).

In short, as explained by this Court in *United States* v. *Patten*, 226 U. S. 525 (1913):

> "The limitations upon our jurisdiction under the Criminal Appeals Act are such that we must accept the Circuit Court's construction of the counts and consider only whether its decision that the acts charged are not condemned as criminal by the Anti-Trust Act is based upon an erroneous construction of that statute" (p. 535).

Authorities cited by Government.

The Government cites generally, with reference to the commerce clause and the commerce power of Congress, numerous decisions, historical incidents, text writers and other authorities (pp. 13-69).

In view of the total irrelevancy of the Government's discussion of these theoretical issues, there is no need to discuss specifically the authorities cited. Most of the authorities, it might be noted, are individuals who expressed views on fire insurance prior to this Court's sweeping opinion in the *Deer Lodge* case disposing of those views.

We merely wish to add that *none* of these authorities states that fire insurance is commerce within the meaning of the Sherman Act.

Conclusion

Fire insurance must, necessarily, be regulated.

This regulation, however, whether State or Federal, must take a cooperative rather than a competitive form. The experience of the States and the economics of the business teach us that this is imperative.

If the Federal Government is now to supersede the States in the regulation of fire insurance, as the Government would seem to desire, we submit that such revolutionary action should be taken by Congress. A legislative body alone can study the operations of the business, and adapt the legislative provisions accordingly. A judicial order blindly subjecting fire insurance to a rigid competitive standard would make bad law and worse economics—creating enormously greater problems and giving rise to far greater evils than any sought thereby to be solved.

The order of the District Court dismissing the indictment herein should be affirmed.

Respectfully submitted,

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Appendix A.

COMPARISON OF NET PREMIUMS WRITTEN[1]

	Fire Insurance	Inland Marine	Total	% of Inland Marine to total
Alabama	$ 56,743,353	$ 1,899,263	$ 58,642,616	3.2
Florida	70,271,342	3,434,635	73,705,977	4.7
Georgia	74,050,596	4,074,369	78,124,965	5.2
North Carolina	79,464,779	3,153,942	82,618,721	3.8
South Carolina	36,917,918	1,075,578	37,993,496	2.8
Virginia	72,701,154	3,275,236	75,976,390	4.3
TOTAL	$390,149,142	$16,913,023	$407,062,165	4.2

[1] "Net premiums written" are the total premiums on contracts issued less return and reinsurance premiums.

* * * * * *

SOURCE: The above statistics regarding the amount of Fire and Inland Marine Insurance net premiums were taken from the Weekly Underwriter's "Record of Fire Insurance by States for 1942" (1943). The totals and percentages were compiled by counsel.

Appendix B.

The following quotations from leading writers on insurance illustrate that informed opinion opposes competition in fire insurance as against the public interest.

Huebner's "Property Insurance" (3rd Ed. 1938) in referring to the evils of competition in insurance states:

> "* * * Open competition instead of being the 'life of business,' as was once so generally believed, has proved to be the source of numerous discriminatory practices and the financial instability of the companies. Cooperation through underwriters' associations, if properly conducted, leads to stability of rates, strengthens the companies financially by avoiding cut-throat competition, results in the adoption of higher standards of business conduct and a better

supervision of the business, and tends to eliminate unfair discrimination."

• • • • • •

"• • • Anti-compact legislation, however, is on the decline. The numerous advantages resulting from concerted action among companies are becoming too apparent to justify any longer a policy of forbidding cooperative effort" (pp. 347, 348 and 356).

Dean, "The Philosophy of Fire Insurance," Vol. I (1925), similarly views with disfavor open competition in fire insurance:

"• • • Open competition simply fixes the tax with reference to the financial standing or personal influence of the owner, without regard to the hazard of the property, and this means favoritism to the financially strong at the expense of the financially weak.

• • • • • •

"Rate reductions made through tariffs are made solely with regard to the fire hazard assumed. Rate reductions made in open competition are made solely through personal considerations" (pp. 32 and 35).

Magee, "Property Insurance" (1941) advances the cogent argument that stability in rate making is essential to public confidence.

"Since it is the function of insurance to indemnify the insured for loss, it is manifestly impossible that this will be accomplished unless sufficient funds for the purpose are collected. In the early days of insurance, unrestrained rate cutting was followed by the failure of scores of companies in periodic disasters. Not until the matter of rate making was

stabilized were insurance companies able to command the confidence of the public."

• • • • • •

"Rate making today is largely a function of organization set up and maintained by insurance companies, and the rates promulgated by them are observed by all companies participating. The first efforts to set up regional rate making organizations met with bitter opposition. • • • As the outgrowth of this opposition, various state legislatures undertook to prohibit cooperative rate making by the enactment of bills that came to be known as 'anti-compact laws.' However, it soon became apparent to those entrusted with the regulation of insurance companies that there devolved upon them an important duty that must be given precedence over the problem of securing rate reductions through the operation of unrestrained competition. Recognition of importance of safeguarding the solvency of companies was the first step in the direction of ending competitive rates and the establishment of cooperative rate making agencies" (pp. 119, 120, 121 and 122).

Mowbray "Insurance, its theory and practice in the United States" (2d Ed. 1937) concisely states that:

"• • • unregulated competition leads to rate wars which vitiate the financial foundation of the business, or to commission wars which are even more detrimental to the interest of policyholders and public. Whatever may be said for competition as a regulator in other economic fields, it works badly in the making of insurance rates."

• • • • • •

"• • • In the public interest such competition must be restricted within reasonable bounds, either by state compulsion or by voluntary action."

• • • • • •

> "The more recent tendency in state policy has been to recognize the need of cooperation in rate making, and to require by law membership in a rating organization for each territory in the state in which the company operates, making adherence to its rates and rules mandatory" (pp. 315, 444 and 446).

Zartman and Price, "Property Insurance" (1921), points out the desirability of cooperation among fire insurance companies:

> "What, then, is our conclusion regarding efforts at cooperation among the companies? It is that such cooperation is highly desirable from every point of view" (p. 246).

Moore, "Fire Insurance and How to Build" (1903), presents the following irrefutable argument in favor of State curtailment of fire insurance competition:

> "It should not require argument to demonstrate that, since all the companies having policies on a burned property must incur the same percentage of loss and also the same percentage of expense, they should get the same rate, and the property-owner may well be suspicious of a company offering to write at a lower rate than the majority of companies are willing to accept" (p. 33).